IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-492

STATE OF OHIO,

Petitioner,

vs.

TERRY L. GALLAGHER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

LEE C. FALKE,
Prosecuting Attorney of
Montgomery County, Ohio

HERBERT M. JACOBSON,
Chief Trial Counsel

RANDAL A. ANDERSON, JR.,
Assistant Prosecuting Attorney

Montgomery County Courts Bldg.
41 N. Perry Street, Suite 308
Dayton, Ohio 45402

ATTORNEYS FOR PETITIONER

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The Petitioner, the State of Ohio, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in the above-entitled case on June 26, 1974.

OPINIONS BELOW

The opinion of The Supreme Court of Ohio is reported at 38 Ohio St. 2d 291, 67 Ohio Ops. 2d 354 and is printed as Appendix A. The opinion of the Court of Appeals for Montgomery County, Ohio is reported at 36 Ohio App. 2d 29, 65 Ohio Ops. 2d 17, 301 N.E. 2d 888 and is printed as Appendix B.

JURISDICTION

The judgment of The Supreme Court of Ohio was entered on June 26, 1974. The Court denied a petition for Rehearing on July 31, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3) since a right has been especially set up and claimed under the Constitution of The United States.

QUESTIONS PRESENTED

1. Should the prophylatic rules of Miranda be extended to a parole officer (who is a Law Enforcement Officer only in the sense that he can arrest a parole violator) when he interviews the Defendant (his parolee) in jail (but not incommunicado and not in a police dominated atmosphere) so as to exclude the parole officer's testimony offered at a later trial as to the Defendant's confession to him if the parole officer did not recite to the Defendant the Miranda warnings on the ground that the situation was inherently compulsory and therefore there was a violation of the Fifth Amendment to The United States Constitution, even though there was no reason to believe that the confession was unreliable or

that the parole officer did anything oppressive or illegal?
2. Assuming arguendo that a parole officer (with the aforesaid limited arrest powers) is a Law Enforcement Officer within the purview of Miranda and that his interview in jail with his parolee is a psychologically similar situation to that comprehended by Miranda, is not a complete recitation to said parolee of the Miranda warnings coupled with his full understanding and waiver of same, given to him a short time before said interview by police officers, sufficient compliance with Miranda or must said warnings be repeated at each interview so as not to vitiate an otherwise perfectly reliable statement?

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision which the above entitled Petition involves is as follows:

Constitution of the United States, Amendment V:

> No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

Factual Statement

On May 27, 1972, a small food store in Dayton, Ohio (known as the 7-11) was robbed at gunpoint by two men. One of the men pointed the gun at Alex Dean, the

manager, and did all of the talking. The other man, the Respondent, just stood near the gun wielder, then left with him and they walked together along the front of the store, to the corner thereof; approximately 35 feet. The Respondent was wearing a blond wig and sun glasses.

On June 21, 1972, Respondent, a 24 year old man, was arrested by a Montgomery County Sheriff's deputy in connection with other robberies. He had been released on parole from an Ohio prison on February 22, 1972 and was still being supervised by the Ohio parole authorities.

On the morning of June 22, 1972, Detective Wright of the Montgomery County Sheriff's Office and Detective Walsh of the Dayton Police Department questioned Respondent. Previous to the questioning, Detective Walsh, using a printed form, recited the so-called Miranda warnings to the Respondent. Respondent signified his understanding and his waiver of the rights delineated thereby and formalized this act by signing the waiver form. (Tr. 102-105).[1]

On June 26, 1972, Bill Sykes, the Respondent's parole officer, went to the Montgomery County jail to talk to the Respondent and asked the Respondent if he would tell him why he was there, but Respondent said he didn't want to. (Tr. pp. 147-149, 151). Then, on July 3, 1972, on a return visit by Mr. Sykes, the Respondent, without prompting, told Mr. Sykes the full details concerning the armed robbery of the 7-11 and his part therein including the facts that he was carrying a gun and wearing a wig and sunglasses. (Tr. pp. 152-155). No use was made by Mr. Sykes of any of the so-called Miranda warnings.

1. Tr. refers to the Reporter's Transcript of the proceedings in The Common Pleas Court of Montgomery County, Ohio. A certified copy of this transcript is filed with this Court.

At the Respondent's trial which commenced on November 2, 1972 to a judge (Respondent having waived a jury), Mr. Dean identified Respondent as one of the two robbers of The 7-11 Store and he and two customers described Respondent's actions in the store and described him perfectly.[2] The prosecution then offered Detective Wright's testimony, but the Court, after conducting a a voir dire examination with respect to compliance with the Miranda decision and voluntariness, rejected Detective Wright's and Detective Walsh's testimony as to any admissions of Respondent on the ground that they were involuntary. (Tr. 102-146). No mention was made of any irregularity in the waiver of the Fifth and Sixth Amendment rights by Respondent.

The testimony of Mr. Sykes, the parole officer, was offered and, over an objection that any communication between he and Respondent was *privileged* (Tr. 149-150), he related to the Court what the Respondent had told him about Respondent's involvement in the 7-11 robbery. (Tr. 153-156). Mr. Sykes said that he and Respondent just had an informal talk, that no force was used, and that their conversation certainly was not an interrogation. (Tr. p. 167). Mr. Sykes also said he had no arrest powers beyond that of arresting a parolee alleged to be in violation of the terms of his parole. (Tr. 165).

The respondent testified and admitted that he was not forced to talk to Mr. Sykes and that his statements to Mr. Sykes were made voluntarily. The only dispute was a factual one as to the contents of those statements. (Tr. 207 and 208).

The Court's verdict on November 14, 1972 was that

2. (Mr. Dean's identification had survived a pre-trial motion for suppression on due process grounds.)

Respondent was guilty of Armed Robbery and, on November 30, 1972, after a pre-sentence investigation, Respondent was sentenced to 10 to 25 years in the Ohio State Penitentiary.

HOW THE FEDERAL QUESTION AROSE

Respondent's objection to the testimony of Mr. Sykes was not based on the holding in *Miranda v. Arizona,* 384 U.S. 436 (1966) (Tr. 149-150), but he touched upon that case in his argument addressed to his oral motion for a dismissal at the conclusion of the State's case in chief while still disavowing his reliance thereon. (Tr. 194-196). However, the decision was appealed as of right to the Ohio Second District Court of Appeals where, in his First Assignment of Error, Respondent relied solely upon the holding in *Miranda v. Arizona,* supra and the case of *Mathis v. United States,* 391 U.S. 1 (1967). The Court of Appeals affirmed (Appendix B). Whereupon, the Respondent moved The Supreme Court of Ohio for leave to appeal the decision of the Court of Appeals which was granted. In his brief on said Motion for Leave and in his brief on the Merits in The Ohio Supreme Court, the Respondent assigned only one error, ie the admission of the parole officer's testimony in violation of the principles of *Miranda v. Arizona,* supra. The Supreme Court of Ohio reversed the Court of Appeals on June 26, 1974 (Appendix A) on the ground that there was error of a constitutional dimension in the admission of said testimony of the parole officer in that Respondent was compelled to be a witness against himself in violation of the Fifth Amendment to the United States Constitution unless the warnings set forth in *Miranda v. Arizona,* supra were recited to him.

REASONS FOR GRANTING THE WRIT

I.

The Important Question of Whether the Constitutional Exclusionary Rule Enunciated in *Weeks v. United States* and *Miranda v. Arizona* Applies to Interviews Between Parole [Probation] Officers and Their Clients Where There Is Absolutely No Evidence of Compulsion—a Question On Which There Has Been Conflict in State and Federal Decisions—Is Squarely Presented Here and Should Be Decided By This Court.

The petitioner contends that the Ohio Supreme Court has misinterpreted the holding of this Honorable Court in *Miranda v. Arizona,* 384 U. S. 436, 16 L.Ed. 2d 694, 86 S. Ct. 1602 and especially as that decision has been recently reinterpreted in *Michigan v. Tucker,* __U.S.__, 94 S. Ct. 2357. Furthermore there is direct conflict on this important question as to whether to apply Miranda to these types of situations between the various state courts and between some state courts and the Federal courts. In this case a State parole officer was involved. In others, it was a probation officer; but the principle is the same.

Three states have previously held that a parole officer is bound by Miranda: *State v. Lekas,* 201 Kan. 579, 442 P. (2d) 11 (1968); *State v. Williams,* 486 S. W. (2d) 468 (Missouri Sup. Ct. 1972); and *People v. Gastelum,* 237 Cal. App. (2d) 205, 46 Cal. Rptr. 743 (1965). Now, with this case, there are four. However, the facts of those three cases are not even remotely similar to those in this case inasmuch as the parole officer interrogated the defendant in them just like a policeman. These courts have been joined by the Fifth Circuit United States Court of Appeals in *United States v. Deaton,* 468 F.2d

541 (1972) (cited at length by The Ohio Supreme Court in their opinion in this case).

However, five states have held differently: *Cunningham v. Texas,* 488 S.W. (2d) 117 (1972) (Texas Court of Criminal Appeals); *State v. Johnson,* 202 N.W. (2d) 132 (1972) (So. Dakota Sup. Ct.); *People v. Ronald W.,* 24 N.Y. (2d) 732, 302 N.Y.S. (2d) 260, 262 (1969) (Court of Appeals); *Gilmore v. People,* 171 Colo. 358, 467 P. (2d) 828 (1970) (Colorado S. Ct.); and *Nettles v. State,* 248 So. (2d) 259 (Florida Dist. Ct. of Appeals, 1971).

Thus, there are conflicting opinions on this federal issue from State Appellate Courts and United States Courts of Appeal and this issue will continue to be resolved in differing manners in State Supreme Courts, Federal Trial Courts, and Federal Appellate Courts until this Honorable Court offers a definitive opinion as to the admissibility of such a witness' testimony under the same or similar circumstances.

In addition to the conflict, it is respectfully submitted that The Ohio Supreme Court was wrong when it held that the decision of this Honorable Court in Miranda was applicable to the facts in this case so as to require the exclusion of the testimony of the parole officer because he compelled the Respondent to confess in violation of Respondent's Fifth Amendment rights. This is an unwarranted extension of this Honorable Court's holding in Miranda as explained in *Michigan v. Tucker,* supra.

Miranda, by its very language, was confined in its application to situations where there was incommunicado interrogation in a police dominated atmosphere. This has recently been reiterated in Tucker. Additionally, the prophylactic rules of Miranda were aimed only at the police and, since otherwise reliable evidence of guilt was

to be excluded by failure to follow them, were stated explicitly in Tucker to be applicable to two situations only: 1) to deter the police, and 2) to insure reliability. As to these, the Court in Tucker said: "Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." and "Cases which involve the Self-Incrimination Clause, must, by definition, involve an element of coercion, since the clause provides only that a person shall not be compelled (emphasis added) to give evidence against himself." It is submitted that neither factor is at all likely to be involved where parole or probation officers are concerned and, since there is not a trace of force in this case, the Ohio Supreme Court erred in applying the coercion clause of the Fifth Amendment to the facts herein. After all, is it possible to pull yourself up by your own bootstraps by denying that a privileged communication exists while asserting that one does exist privately so as to indirectly find coercion where none in fact exists? Thus, the Ohio Supreme Court erred in finding, as a matter of law, that the Respondent was compelled to be a witness against himself when neither he nor his parole officer believed that he was under any pressure from a compelling atmosphere or for any other reason[3] and this case presents a substantial and important question as to the meaning of Compulsion under the Fifth Amendment, which question should be resolved by this Court.

The extreme importance of this question to the people of Ohio and of the other States can not be underestimated and is illustrated by the fact that, in reliance upon the wording and rationale of this Honorable Court

3. Respondent testified that his statement to Sykes was completely voluntary (Tr. 207 and 208).

in Miranda, supra, the trial court allowed the police officer to testify. Other trial court's (and especially since the decision in Tucker, supra) will most probably do the same and possibly be reversed as in this case, thus possibly freeing other individuals extremely dangerous to the public safety as will most probably happen here if this decision is permitted to stand. Furthermore, will the Ohio Court and other Courts extend their conception of compulsion to the parole or probation officer's testimony at revocation hearings? Ohio has already, in this case, extended Miranda to the parole officer's office. Does that require a lawyer at every interview? What will that do to their relationship?

Relevant and material evidence should be rejected only if it is demonstrably unreliable. The rejection by a State Court of such evidence [formerly admissible] on the ground that it was obtained by a violation of the Defendant's Constitutional Rights under the Constitution Of The United States gives rise to an issue which should be resolved by this Court.

II.

The Additional Important Question Of Whether The Warning Required by Miranda Must Be Repeated at Each Interview Once They have Been Given And The Rights Effectively Waived Is Also Squarely Presented Here and Should Be Decided By This Court.

In the case of *Maguire v. United States*, 396 F.2d 327 (1968), the Ninth Circuit United States Court of Appeals found that an adequate rendition of the Miranda warnings to a defendant was sufficient and that they did not have to be repeated three days later. Now the Ohio Supreme Court in this case has decided that this is not the law and that the warnings must be repeated

and (by extension) the waiver, also[4]. A direct conflict on an important federal question between a federal court and the highest court of a state thus exists and should be resolved by this Honorable Court.

This situation, of course, comes up again and again at the trial level and, in the writers' experience has been resolved both ways by the trial courts; but mostly by following Maguire, supra.

Applying the reasons given in Miranda for requiring the warnings to these situations involving parole and probation officers, both here and in other cases, can it be said that there is such a need to control said officers and such a likelihood that unreliable evidence will be forthcoming without the warnings; especially when parolees and probationers are usually experienced law breakers well aware of their rights? Thus, to require repeated warnings for such as defendant and to exclude reliable evidence when they are not given flies in the face of reason and of the intendment of Miranda.

Thus, because there is a conflict, as stated hereinabove, because this is an important federal question not heretofore decided by this Honorable Court, and because the Ohio Supreme Court has decided this question contrary to the interpretations given to the compulsory self-incrimination clause of the Fifth Amendment to the United States Constitution heretofore rendered by this Honorable Court in Miranda and Tucker, supra, this is a question which should be resolved by this Court for clarification and direction to the various State Courts and lower Federal Courts.

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4. See Appendix A, pages 15 f.n. 2 & 19 f.n. 6.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LEE C. FALKE,
Prosecuting Attorney of
Montgomery County, Ohio

HERBERT M. JACOBSON,
Chief Trial Counsel

RANDAL A. ANDERSON, JR.,
Assistant Prosecuting Attorney

APPENDIX A

THE STATE OF OHIO,
Appellee,

v.

GALLAGHER,
Appellant.

[Cite as State v. Gallagher (1974), 38 Ohio St. 2d 291.]

Criminal law — Evidence — Statements by accused to parole officer—Inadmissible, when—Statements made in response to questioning — Miranda warnings not given prior to questioning.

Testimony as to utterances made by an accused to his parole officer is inadmissible at trial where the utterances were in response to questions by the parole officer, and, prior to the questioning, the parole officer failed to advise the accused of his right to remain silent, of his right to be provided with counsel prior to questioning, and warn him that any utterance may be used as evidence against him.

(No. 73-623—Decided June 26, 1974.)

APPEAL from the Court of Appeals for Montgomery County.

On May 27, 1972, an armed robbery occurred at a 7-11 store, located in Dayton, Ohio.

Terry L. Gallagher, appellant herein, was charged with the robbery, and waived his right to a jury trial.

The store's cashier described the robbery as follows: A tall man (not the defendant) approached the check-out counter, ordered a pack of cigarettes, requested change for a ten dollar bill, and then brandished a pistol and instructed the cashier to put all the money into a paper sack. At the time, there were some children in the store at a candy rack, a repairman working on an ice machine, who apparently never noticed that a robbery was taking place, and a man later identified as Gallagher.

Gallagher stood an arm's length from the gunman; but "never said a word to" the cashier, never exhibited a gun, never said a word to or made gestures at the gunman, nor manifested in any way his participation in the crime. However, when the gunman left the store with the money, Gallagher, and the gunman walked out of the store and out of view "side by side."[1]

The record shows further that two women entered the store at the time the cashier was filling the bag with money. At trial, the women corroborated the cashier's account of the robbery, from the time they entered the store until Gallagher and the gunman left the store.

The women were unable to identify Gallagher, but the cashier had previously identified Gallagher and the gunman from police photographs, and made a positive identification of Gallagher at trial.

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1. At a pre-trial hearing, upon a motion to suppress certain evidence, the cashier testified that he had *assumed* the complicity of Gallagher and the gunman because the two men had stood close together in the store and left the store together. However, this testimony was not elicited at trial.

The court granted a hearing on a motion by the defense to determine the admissibility of utterances made by Gallagher to police officers in the following situation: A day after his arrest, Gallagher was taken to a police interview room where he signed a "rights waiver."[2] In the room with him were Detective Wright, from the sheriff's office; Detective Walsh, from the Dayton Police Department; and Jerry Helson, an adult parole officer.

Wright testified to the following: That a Richard Sorrell, who had already made a "statement where he admitted his implication" in the armed robbery of the 7-11 store, was brought into the interview room, at Helson's suggestion, "to either refute or corroborate what was said at that point [by Gallagher];" that Gallagher was told that Sorrell had given a statement to the police, and that if both Sorrell and Gallagher "copped out" on one robbery charge then other robbery charges would be dropped; that Sorrell and Gallagher were allowed to talk privately for a half hour; that Helson and Gallagher then talked privately for a half hour; and that Wright advised Gallagher that he would not be charged with other robberies if he "copped out" on this one.

Walsh testified to the following: That during the interview, Walsh "informed Mr. Gallagher that Sorrell had implicated him [Gallagher] on some of the robberies Sorrell was charged with * * * this one included," and that Gallagher then "indicated a willingness to tell us [the police] about this particular robbery with no other

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2. The sufficiency of any *Miranda* warnings that were given is not challenged in this appeal.

charges and I [Walsh] guaranteed him I would not file any additional charges."

The court granted the motion to suppress, reasoning that "this defendant when giving this statement did act or operate under promises of leniency, and, therefore, the court feels that such action, which we feel could have been avoided by the officers in question, constitutes an involuntary statement and the court, therefore, will decline to receive it."

The next witness for the state was Bill Sykes, who identified himself as Gallagher's parole officer. A motion to suppress this testimony was overruled, and Sykes testified that he visited Gallagher in jail four days after Gallagher's interview with the police officers. At no time did Sykes advise Gallagher of his right to remain silent; that any utterances to Sykes would be used as evidence in court; or of any other *Miranda*[3] right. However, during this visit, Sykes asked Gallagher to relate "the circumstances surrounding the arrest." Gallagher's response to Sykes was that "he didn't want to make any statement in regard to the circumstances surrounding the arrest."

Sykes left, but returned seven days later to Gallagher's cell.

To justify his visits to Gallagher's cell, Sykes explained that it was part of his job to try to get some type of statement from a parolee under his charge who was a criminal suspect.

During the second visit, Sykes renewed his request for information from Gallagher, and Gallagher complied by admitting that he had participated in the robbery.

3. *Miranda* v. *Arizona* (1966), 384 U.S. 436, is referred to herein as *Miranda*.

Counsel for appellant objected to the admissibility of Sykes' testimony, and moved that it be stricken. The motion was overruled.

The court entered judgment on its verdict that appellant was guilty of armed robbery.

Upon appeal, the Court of Appeals, in a reported opinion (*State* v. *Gallagher* [1973], 36 Ohio App. 2d 29), affirmed the judgment of the Court of Common Pleas.

The cause is now before this court pursuant to the allowance of a motion for leave to appeal.

Mr. Lee C. Falke, prosecuting attorney, and *Mr. Randal A. Anderson, Jr.*, for appellee.

Mr. Jack T. Schwarz, for appellant.

WILLIAM B. BROWN, J. The question presented is whether testimony, concerning certain statements made by appellant to his parole officer about his involvement in a crime, was received at trial in violation of appellant's privilege against self-incrimination, as guaranteed by Section 10, Article I of the Ohio Constitution, and the Fifth Amendment to the United States Constitution.

The opinion of the Court of Appeals and the brief of appellee cite cases from other jurisdictions which have considered this question. Of the cases cited, three courts held the testimony of the parole officer inadmissible because the accused had not been given *Miranda* warnings at any time prior to questioning by the parole officer[4]; two courts held the testimony proper because a parole or probation officer is not a "law enforcement officer" as contemplated by *Miranda* and, therefore, the accused was not entitled to *Miranda* warnings[5]; in *Nettles* v. *State*

4. *State* v. *Lekas* (1968), 201 Kan. 579, 442 P. 2d 11; *State* v. *Williams* (Mo. 1972), 486 S. W. 2d 468; and *People* v. *Gastelum* (1965), 237 Cal. App. 2d 205, 46 Cal. Rptr. 743.

5. *State* v. *Johnson* (S. Dak. 1972), 202 N. W. 2d 132; *People* v. *Ronald W.* (1969), 24 N. Y. 2d 732, 249 N. E. 2d 882.

(Fla. App. 1971), 248 So. 2d 259, the court held a probation officer's testimony admissible, even though the officer had failed to advise the accused of his rights, because the accused, by accepting probation, had supposedly effectuated a continuous waiver of the right to be advised of his *Miranda* rights; and in the last case cited, *Gilmore* v. *People* (1970), 171 Colo. 358, 467 P. 2d 828, the court held a probation officer's testimony admissible because the statements made to the officer had been "volunteered" within the meaning of *Miranda*, wherein (384 U. S. 436), at page 478, the United States Supreme Court stated: "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."

In our opinion, the foregoing cases are not persuasive when applied to the facts in this case, which may be briefly summarized as follows: Police officers advised appellant of his *Miranda* rights prior to interrogation, and when the appellant refused to make a statement he was offered promises of leniency and was confronted by an alleged accomplice who had already confessed to the crime. As a result of those tactics, appellant made a statement to the police officers which was later suppressed at trial as an *involuntary* utterance. Four days after appellant's interrogation, his parole officer asked for a statement, but appellant refused to discuss the matter. The parole officer never advised appellant of any of his *Miranda* rights, but nevertheless returned seven days later, requested a statement, and got one. At trial, the parole officer was called as a prosecution witness and related the statements made to him by appellant.

Upon those facts, we view the question presented in this appeal as whether appellant was compelled to pro-

duce evidence against himself or whether utterances to his parole officer were voluntarily given. Upon this ultimate issue of voluntariness, it is our duty to "make an independent determination." *Davis* v. *North Carolina* (1966), 384 U. S. 737, 742.

United States v. *Deaton* (C. A. 5, 1972), 468 F. 2d 541, certiorari denied, 410 U. S. 934, squarely confronts the precise question presented by this case, at page 544:

"• • • Deaton's parole officer testified, over objection, to statements made to him by Deaton, tending to incriminate Deaton on the harboring and concealing charge, uttered in response to direct interrogation by the parole officer when Deaton was in custody, and without the officer having given Deaton the warnings required by *Miranda*. We have considerable doubt as to the propriety of even calling the parole officer as a witness for such a purpose.[6] But, pretermitting that, we have no doubt that

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6. The lack of propriety referred to by the *Deaton* court is more fully illustrated in *Smith* v. *Rhay* (C. A. 9, 1969), 419 F. 2d 160, 164, as follows:

"• • • Although Northrup [the parole officer] was called as a witness for the purpose of describing the investigation and arrest, his testimony revealed through necessary inference that he was already acting in the capacity of Smith's parole officer at the time of the offense. The jury obviously must have inferred that Smith had been previously convicted for unknown crimes, an inference that would place Smith's character in issue as part of the prosecution's case against him. Smith contends that this procedure violated his constitutional right to a fair trial.

"It is a rule of almost universal application that evidence of past crimes cannot be introduced as part of the prosecution's case in chief. The rule is based on both a lack of relevance to the principal case and the highly prejudicial effect that the evidence may have on a jury. • • •"

However, in this case, there was no objection made to the identification of Sykes as appellant's parole officer, and that question is not before this court.

the testimony was inadmissable unless the officer gave prior *Miranda* warnings. A parolee is under heavy psychological pressure to answer inquiries made by his parole officer, perhaps even greater than when the interrogation is by an enforcement officer." [7]

We agree that a parolee is under heavy pressure to cooperate with his parole officer. Here, the parole officer testified that he had the power to recommend the return to prison of a parolee under his charge, and that appellant might have assumed that his utterances were in some way confidential.

It is clear, therefore, that compulsion intervened when the parole officer sought to elicit a statement from appellant, without first making known to appellant that the privilege against self-incrimination could be relied upon.

Accordingly, we hold that testimony as to utterances made by an accused to his parole officer is inadmissible at trial where the utterances were in response to questions by the parole officer and, prior to the questioning, the parole officer failed to advise the accused of his right to remain silent, his right to be provided with counsel prior to questioning, and to warn him that any utterance may be used as evidence against him.

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7. The *Deaton* court went on to affirm the conviction, because on the day preceding the statement to the parole officer, Deaton had made verbal statements to police officers "after having been given proper *Miranda* warnings," and subsequent to the statement to the parole officer, Deaton reduced the prior verbal statement to police officers into a formal recorded statement. Thus, the court concludes, "the statements to the parole officer were merely cumulative of evidence from other sources." In this case, however, prior statements to police officers were properly suppressed at trial as involuntary utterances.

Therefore, the judgment of the Court of Appeals is reversed, and the cause is remanded to the Court of Common Pleas for further proceedings in accordance with law.

Judgment reversed.

O'NEILL, C. J., HERBERT, STERN, CELEBREZZE and P. BROWN, JJ., concur.

CORRIGAN, J., dissents.

APPENDIX B

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO,
Plaintiff-Appellee,

vs.

TERRY L. GALLAGHER,
Defendant-Appellant.

Case No. 4158

OPINION

Rendered on the 30th day of May, 1973.

* * *

LEE C. FALKE, Prosecuting Attorney, By Randal A. Anderson, Jr., Assistant Prosecuting Attorney, 308 County Courts Building, 41 N. Perry St., Dayton, Ohio 45402,
Attorneys for Plaintiff-Appellee.

JACK T. SCHWARZ, 604 American Building, Dayton, Ohio 45402,
Attorney for Defendant-Appellant.

* * *

SHERER, J.

Defendant-Appellant is appealing from a conviction of guilty of armed robbery of a Xenia Avenue 7-11 Store on or about May 27, 1972. He was tried without a jury

and sentenced for from ten to twenty-five years in the Ohio State Penitentiary.

Appellant claims as assignments of error the refusal of the trial judge to suppress the statements Appellant made to his parole officer, William Sykes, and the judge's failure to direct a verdict in favor of Appellant at the end of the State's case.

The Record shows that on or about the afternoon of May 27, 1972, Alex Dean, an employee of the 7-11 Store, was robbed at gunpoint of approximately $350.00 by two young men. He testified that while the two men stood within arm's length of each other, only one of the two, not Defendant-Appellant, held the gun, did all the talking, and received the money. The two men then left the store together.

Although there were two female adults in the store at the time who corroborated Mr. Dean's account of the robbery, only Mr. Dean was able to later identify Appellant as one of the robbers, which he did from a group of photographs shown to him by the Dayton police.

At the trial of this cause, William Sykes, a parole officer assigned to Appellant when he was released from prison on a previous conviction, was permitted to testify, over objection, that he conversed with Appellant on two separate occasions while Appellant was incarcerated after arrest on the present charge. The first conversation occurred on June 26, 1972, at which time Appellant told Mr. Sykes he did not wish to discuss the incident. Mr. Sykes testified that at the second meeting, on July 3, 1972, Appellant admitted to him that he went to the 7-11 Store on the day in question with the man who robbed the store, that he had a weapon, that he was prepared to use it, and that he and the robber acted in concert (T-154). Mr. Sykes further testified that he at no time

advised Appellant of his rights to remain silent, to have an attorney present, and that anything he said could be used against him.

It is the Trial Court's admission of Mr. Sykes' testimony, which Appellant avers is in violation of the constitutional requirements of *Miranda vs. Arizona, 384 U. S. 436,* that Appellant raises as his first assignment of error.

The issue of whether a parole or probation officer is a "law enforcement officer" within the contemplation of *Miranda* and thus subject to the *Miranda* requirements of constitutional warnings to suspects during custodial interrogation has not yet been decided in Ohio. But a review of decisions in other jurisdictions reveals that decisions have gone both ways.

In *State vs. Lekas, 201 Kan. 579, 442 P. (2d) 11 (1968),* the Supreme Court of Kansas held that officers of the Kansas State Board of Probation and Parole are required to comply with the mandates of *Miranda* if while investigating a fresh felony by a parolee they elicit incriminating statements later admitted into evidence in the prosecution of that new offense. In *Lekas* and two cases which concur with it, *State vs. Williams, 486 S.W. (2d) 468 (Missouri Sup. Ct. 1972),* and *People vs. Gastelum, 237 Cal. App. (2d) 205, 46 Cal. Rptr. 743 (1965),* the defendant had not been given the full *Miranda* warnings at any time previous to the questioning by the parole officer.

In *State vs. Johnson, 202 N. W. (2d), 132 (1972),* the South Dakota Supreme Court held differently by distinguishing a parole or probation officer from the "law enforcement officer" envisioned in *Miranda,* stating at page 133-134:

> "It is the duty of a law enforcement officer to detect crime and enforce the criminal laws of the state. The duty of the probation officer is the antithesis of this. His duty begins when the peace officer's duty ends. He does not have a peace officer's broad power of arrest. He has only the limited authority to take and detain a probationer when the terms of the suspension or probation have not been observed or when it is necessary to prevent escape or enforce discipline. Otherwise he has supervisory powers only to help in the reformation and rehabilitation of convicted persons on probation, parole, or suspended sentences."

In *People vs. Ronald W., 24 N. Y. (2d) 732, 302 N. Y. S. (2d) 260, 262 (1969),* the Court of Appeals of New York remarked:

> "The clearly stated objectives of education and rehabilitation which are always paramount in the relationship between the probation officer and the probationer are totally foreign to the elements the Supreme Court addressed itself to in *Miranda.*
>
> . . . . . .
>
> "It is true that a probation officer is a 'peace officer' but, certainly, he is not a 'law enforcement' officer within the spirit or meaning of *Miranda v. Arizona.*"

Gilmore vs. People, 171 Colo. 358, 467 P. (2d) 828 (1970), involved statements made by a defendant to his federal probation officer. The defendant had been given the *Miranda* warnings by the police and he denied everything they charged him with. He then admitted the offense to the probation officer. The Trial Court held that the defendant was adequately warned of his *Miranda* rights by the police and that any statements he made subsequently to anyone else were made voluntarily.

In *Nettles vs. State, 248 So. (2d) 259* (Florida Dist. Ct. of Appeals, 1971), the Court held admissible a defendant's admission to his probation officer who failed to give him the *Miranda* warnings. As in the case now

before us, the defendant had signed a waiver of his *Miranda* rights six days before he made the statement to the probation officer. The Florida court analogized probation to being in constructive custody whereby the probationer agreed to abide by certain rules and restrictions as conditions for probation. The Court went on to state that the probationer waived his constitutional *Miranda* rights when he accepted probation and this waiver continued in effect even on a new and fresh crime insofar as the probation officer is concerned:

> "We do not hold that he had waived his *Miranda* rights in all circumstances but as to his probation officer the waiver was in continuing effect during the term of his probation and he was not entitled to *Miranda* warnings.
>
> . . . . . .
>
> ". . . if upon every visit or contact with the probation officer the probationer is entitled to a warning then the relationship between the probation officer and the probationer would be a strained one indeed and the purpose of probation would be materially affected.". *248 So. (2d), at 260.*

We feel compelled, by the facts of the instant case, to follow the majority decisions in other jurisdictions and agree with the Trial Court that the statements Mr. Gallagher made to his parole officer are admissible in evidence against him. The record shows that Appellant was fully advised of his *Miranda* rights by the Dayton Police on June 22, 1972, shortly after his arrest, and he signed the standard pre-interview form that lists all the rights, thereby agreeing that any statements he made thereafter were of his own free will. The law is established that there is no requirement to repeat these warnings during subsequent questioning, even if several weeks elapse and further questioning is conducted by other persons. *Gor-*

man vs. U.S., 380 F. (2d) 158, 164 (1st. Cir. 1967); Maguire vs. U.S., 396 F. (2d) 327, cert. denied, 393 U.S. 1099 (1968).

Mr. Sykes testified that he visited Appellant initially on June 26, 1972:

> "It's part of my job when one of my fellows gets arrested, I'm to interview him and see what his circumstances are." T-148

At that time, Appellant said that he did not wish to make any statement in regard to the circumstances surrounding the arrest (T-151). Mr. Sykes returned to Appellant on July 3, 1972, again at his own discretion, as "part of my job" and elicited the admissions concerning the armed robbery in question (T-151).

This Court is of the opinion that Mr. Sykes on both visits was merely carrying out his duty as a parole officer to investigate any violations of the law committed by his parolee. This is not done solely to elicit confessions that can later be used against the parolee at trial, but merely to aid in the rehabilitation of the parolee. There is no indication in the record that Mr. Sykes acted jointly with the police, at their instigation, or as an agent or tool of the police. Nor does the testimony of Appellant at trial indicate otherwise. Appellant stated that he was not forced to talk with Mr. Sykes in the jail, that he knew he did not have to talk with him, that everything he said was said voluntarily (T-206-07).

Appellant also contends that the relationship of parole officer and parolee is a privileged one, that all communications between the two are thereby confidential, and that to hold otherwise would undermine the rehabilitation process envisioned by the parole system. While we agree that a beneficial relationship between the parole officer and his charge depends upon mutual trust and

confidence, we are unable to agree that communications between the two fall within the class of inadmissible privileged communications such as those of attorney-client, husband-wife, physician-patient, or priest-penitent. A parolee is advised of the restrictions and conditions of his parole, that he can lose his parole status if he violates those precepts, and that his parole officer has the power to arrest him for transgressions. Under these circumstances then, we cannot hold that Appellant's admissions to Mr. Sykes were privileged, regardless of what Appellant may have thought at the time.

Appellant's first assignment of error will therefore be overruled.

Appellant contends as his second assignment that the Trial Court erred to his prejudice in overruling his motion to dismiss the action at the close of the prosecution's case. He claims that his statements to Mr. Sykes were inadmissible and that without those statements, there was insufficient evidence with which to convict him. Since this supposed error relies on the exclusion of Appellant's statements as to the crime in question, and having already ruled that said statements are admissible, we must overrule Appellant's second assignment of error. It is clear from a review of the record as a whole that there was ample evidence to sustain the Court's verdict of guilty.

Having found no error in the record prejudicial to Appellant, the judgment of the Common Pleas Court will be affirmed.

. . . . . .

CRAWFORD, P. J., and KERNS, J., concur.

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-492

STATE OF OHIO,

Petitioner,

vs.

TERRY L. GALLAGHER,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petition for Certiorari Filed October 29, 1974

Certiorari Granted March 31, 1975

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IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO CRIMINAL DIVISION

STATE OF OHIO,
Plaintiff-Appellee,

VS.

TERRY L. GALLAGHER,
Defendant-Appellant.

RANDAL A. ANDERSON, *Asst.*
Prosecuting Attorney for
Plaintiff-Appellee
JACK T. SCHWARZ,
Attorney for Defendant

Court of Appeals No. 4158

Common Pleas No. 72-CR-826

TRANSCRIPT OF DOCKET AND JOURNAL ENTRIES, AND ALL ORIGINAL PAPERS

1.	July 7, 1972	Transcript and all papers from Dayton Municipal Court filed — bond $10,000.
2.	July 20, 1972	Indictment for Armed Robbery filed.

3.	Aug. 16, 1972	Entry filed August 15, 1972. Defendant, waived, plead not guilty. Pretrial set for August 21, 1972—bond continued. RICE
4.	Aug. 31, 1972	Entry filed — appointing James P. Hickey, as counsel for defendant. RICE
5.	Aug. 29, 1972	Entry filed — ordering $50.00 paid James P. Hickey, for counsel fees. RICE
6.	Aug. 29, 1972	Entry filed—appointing Gus Niarchos, as counsel. RICE
7.	Sep. 15, 1972	Entry filed, James P. Hickey permitted to withdraw as attorney for Gallagher. RICE
8.	Sep. 28, 1972	Entry filed — motion of defendant to suppress identification is set for hearing October 17, 1972. RICE
9.	Oct. 3, 1972	Motion filed for an order authorizing the preparation and payment of the transcript of proceedings at the preliminary hearing; order directing the prosecuting attorney to furnish defense counsel — names and addresses of all witnesses; order reducing the amount of bond — filed by attorney for defendant.
10.	Oct. 11, 1972	Entry filed, setting further proceedings on motions: Motion authorizing preparation and payment of transcript is sustained. Branch 2

		and 3 of motions of October 3, 1972, will be determined at the same time of defendants' motion to suppress identification which is already set for hearing October 17, 1972. RICE
12.	Oct. 27, 1972	Stenographers Certificate filed -- Hargrose, Reporter.
13.	Nov. 2, 1972	Waiver of Jury filed.
14.	Nov. 14, 1972	Stenographers Certificate filed — Futrell, Reporter.
15.	Nov. 16, 1972	Verdict filed—court finds defendant guilty as charged. RICE
16.	Nov. 30, 1972	Stenographers Certificate filed — Futrell, Reporter.
17.	Nov. 30, 1972	Entry filed, appointing Jack Schwarz, as counsel. RICE
18.	Nov. 28, 1972	Entry filed—ordering $250.00 paid Jack Schwarz, for counsel fees. RICE
19.	Dec. 6, 1972	Entry filed November 30, 1972. Defendant, sentenced to O.S.P., for a period not less than ten (10) nor more than twenty-five (25) years. RICE
20.	Dec. 6, 1972	Warrant to convey issued to Sheriff.
21.	Dec. 11, 1972	Motion filed for the court to order the Court Reporter to prepare a transcript of the trial and to be prepared at the expense of the

state. Motion filed by attorney for defendant.

22. Dec. 11, 1972 Notice of **Appeal** filed by attorney for defendant.

(Jurat omitted in Printing)

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO,
Plaintiff,

VS.

TERRY L. GALLAGHER,
Defendant.

Case No. 72-CR-826
(Judge Walter H. Rice)

VERDICT

The captioned cause came on to be heard, upon its merits, before the Court sitting as the trier of fact, a jury having been waived by the defendant in open Court. Issues were joined by the defendant's entering a plea of not guilty to an indictment charging him with Armed Robbery.

Upon due consideration of the facts adduced at the hearing on the merits of the captioned cause, as well as upon a thorough consideration of the law that applies to the facts as found, it is the opinion of the Court that the State has sustained its burden of proof beyond a reasonable doubt of each and every essential element of the offense of Armed Robbery. Accordingly, it is the opinion of the Court that the defendant is and is hereby declared to be GUILTY AS CHARGED.

The captioned cause is ordered continued until Tues-

day, November 28, 1972, for further proceedings according to law.

Copies of the above were sent to all parties listed below by ordinary mail this 16 day of November, 1972.

APPROVED:

(s) WALTER RICE
WALTER H. RICE, *Judge*

CC:
JOHN SLAVENS, Assistant Prosecuting Attorney.
JACK T. SCHWARZ, Attorney for Defendant.
ASSIGNMENT OFFICE.

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO,
Plaintiff,

vs.

TERRY L. GALLAGHER,
Defendant.

Case No. 72-CR-826

TERMINATION ENTRY

The defendant having been convicted of the offense of Armed Robbery was this 30th day of November, 1972 brought before the Court and was inquired of if he had anything to say why judgment should not be pronounced against him, and having nothing further to say than he hath already said,

It is therefore Ordered and Adjudged by the Court that the defendant, Terry L. Gallagher, be imprisoned at the Ohio State Penitentiary for a period not less than ten (10) nor more than twenty-five (25) years, and pay the costs of prosecution taxed at $ ..... Defendant is to remain in the Montgomery County Jail until December 7, 1972 pending a report from the Adult Probation Department.

The Court instructed the defendant that he has a right to file a direct appeal to the Second District Court of Appeals within thirty (30) days and that if indigent, a right to prosecute an appeal without expense and with counsel appointed by the Court to be paid by the State. Upon inquiry the defendant indicated in open Court that

he understood his rights of appeal as explained by the Court.

Attorney Jack Schwarz is hereby appointed as Counsel for Appeal. Defendant is sentenced under Section 2901.13 of the Ohio Revised Code.

APPROVED:

(s) WALTER RICE
Judge, WALTER H. RICE

LEE C. FALKE
Prosecuting Attorney

By (s) JOHN M. SLAVENS
JOHN M. SLAVENS
Assistant Prosecuting Attorney

cc: Defense Counsel, Jack Schwarz, 604 American Bldg.

MONTGOMERY COUNTY COURT OF APPEALS

STATE OF OHIO,
Plaintiff-Appellee,

VS.

TERRY L. GALLAGHER,
Defendant-Appellant.

Supreme Court Case No. 73-623

Court of Appeals No. 4158

LEE C. FALKE, *Pros. Attorney*
By Randal A. Anderson, Jr.
41 N. Perry St., Dayton, Ohio

JACK T. SCHWARZ
604 American Building
Dayton, Ohio 45402
Attorney for Defendant-Appellant

TRANSCRIPT OF THE DOCKET AND JOURNAL ENTRIES, AND ALL ORIGINAL PAPERS

1.	December 11, 1972	Notice of Appeal filed in Common Pleas Court, Case No. 72-CR-826. Appeal from Decision rendered November 30, 1972, finding Defendant guilty of offense of armed robbery.

2.	December	12, 1972	Transcript of the docket and entries filed.
3.	January	16, 1973	Transcript of Proceedings filed. (2 Vol. 1 Env.) Attorneys notified by mail.
4.	February	8, 1973	Entry filed. Time extended to Appellant to 2-28-73 for Brief.
5.	March	5, 1973	Entry filed. Time extended to Appellant to 3-15-73 for Brief.
6.	April	10, 1973	Brief of Defendant-Appellant filed.
7.	April	30, 1973	Brief of Plaintiff - Appellee filed.
8.	May	30, 1973	Opinion filed. Judgment will be affirmed.
9.	June	6, 1973	Entry filed. Judgment of conviction and sentence is affirmed.
10.	June	28, 1973	Entry filed. Jack Schwarz to receive $250.00 atty. fee.
11.	June	29, 1973	Notice of Appeal to Supreme Ct. of Ohio filed.
12.	November	12, 1973	Certified Copy of Entry from Supreme Ct. filed. Jack T. Schwarz of Dayton is appointed to represent appellant in appeal to Supreme Ct.
13.	November	13, 1973	Certified Copy of Entry from Supreme Court. Motion For Leave To Appeal is allowed.
14.	November	13, 1973	Order To Certify Record filed from Supreme Ct. of Ohio.

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO,
Plaintiff-Appellee,

VS.

TERRY L. GALLAGHER,
Defendant-Appellant.

Case No. 4158 C.A.
(C.C.P. 72-CR-826)

ENTRY

This cause came on to be heard upon the appeal of the Defendant-Appellant, Terry L. Gallagher, upon questions of law from the conviction, judgment and sentence of the Court of Common Pleas of Montgomery County, Ohio; said appeal was submitted to the Court upon the assignment of errors and the briefs together with oral arguments of counsel both for the Defendant-Appellant and for the Plaintiff-Appellee and upon the transcript of the complete record including all the original papers, exhibits and bill of exceptions;

And the Court, after careful consideration thereof, finds that there is no prejudicial error to the rights of the Appellant and the judgment of conviction and sentence is hereby affirmed.

(s) CALVIN CRAWFORD, P. J.
CALVIN CRAWFORD, P. J.
Judge
(s) PAUL SHERER
PAUL SHERER
Judge

(See page 22ff of the Petition for Writ of Certorari for the Opinion of the Court of Appeals)

THE SUPREME COURT OF THE STATE OF OHIO

1973 Term

To wit: November 8, 1973

THE STATE OF OHIO,
City of Columbus.

STATE OF OHIO,
Appellee,

vs.

TERRY L. GALLAGHER,
Appellant.

No. 73-623

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS
For Montgomery County

It is ordered by the Court that this motion is allowed.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this 8th day of November, 1973.

THOMAS L. STARTZMAN, Clerk.
By (s) SAM F. ADKINS, Deputy.

THE SUPREME COURT OF THE STATE OF OHIO

1973 Term

To wit: November 9, 1973

THE STATE OF OHIO,
City of Columbus.

STATE OF OHIO,
Appellee,

vs.

TERRY L. GALLAGHER,
Appellant.

No. 73-623

ENTRY

The court having allowed a motion for leave to appeal from the Court of Appeals for Montgomery County in this cause and it appearing to the court that the above named appellant is indigent, it is ordered by the court that Attorney Jack T. Schwarz of Dayton be and hereby is appointed to represent the appellant in this court and proceed to file a brief on the merits.

.....
CHIEF JUSTICE

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ..... Page.....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 9th day of November, 1973.

THOMAS L. STARTZMAN Clerk.
By (s) SAM F. ADKINS, Deputy.

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,
City of Columbus.

To the Clerk of Court of Appeals for Montgomery County, Dayton, Ohio

STATE OF OHIO,
Appellee,

VS.

TERRY L. GALLAGHER,
Appellant.

ORDER TO CERTIFY RECORD

S.C. Case No. 73-623

C.A. Case No. 4158

Pursuant to the provisions of Section 10, Rule II, of the Rules of Practice of The Supreme Court of Ohio, you are hereby Ordered to prepare and forward to this office a certified transcript of docket and journal entries together with all the original papers in the above captioned case. The transcript and papers shall be transmitted to this office within ten days.

Witness my hand and the seal of the Supreme Court this 8th day of November, 1973.

THOMAS L. STARTZMAN, Clerk.

By (s) SAM F. ADKINS, Deputy.

(See page 13ff of the Petition for Writ of Certiorari for the Opinion of The Ohio Supreme Court)

THE SUPREME COURT OF THE STATE OF OHIO

1974 Term

To wit: June 26, 1974

THE STATE OF OHIO,
City of Columbus.

THE STATE OF OHIO,
Appellee,

VS.

TERRY L. GALLAGHER,
Appellant.

No. 73-623

APPEAL FROM THE COURT OF APPEALS

For Montgomery County

This cause, here on appeal from the Court of Appeals for Montgomery County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is reversed for the reasons stated in the opinion filed herein; and, cause remanded to the Court of Common Pleas for further proceedings in accordance with law.

It is ordered and adjudged also that appellant recover from appellee its costs expended in this Court; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Montgomery County for entry.

(Jurat omitted in printing)

THE SUPREME COURT OF THE STATE OF OHIO

1974 Term

To wit: June 26, 1974

THE STATE OF OHIO,
City of Columbus.

THE STATE OF OHIO,
Appellee,

vs.

TERRY L. GALLAGHER,
Appellant.

No. 73-623

MANDATE

To the Honorable Common Pleas Court Within and for the County of Montgomery, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals reversed and cause remanded to the Common Pleas Court for further proceedings in accordance with law, for the reasons set forth in the opinion rendered herein.

THOMAS L. STARTZMAN, Clerk.

..... 19 .....

.....

..... Deputy

THE SUPREME COURT OF THE STATE OF OHIO

1974 Term

To wit: July 31, 1974

THE STATE OF OHIO,
City of Columbus.

THE STATE OF OHIO,
Appellee,

vs.

TERRY L. GALLAGHER,
Appellant.

No. 73-623

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ..... Page .....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 31st day of July 1974

THOMAS L. STARTZMAN, Clerk.

By (s) SAM F. ADKINS, Deputy.

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO,
Plaintiff,

vs.

TERRY L. GALLAGHER,
Defendant.

Case No. 72-CR-826
Court of Appeals No. 4158
(Judge Walter H. Rice)

ENTRY ORDERING DEFENDANT'S RELEASE ON OWN RECOGNIZANCE

The Supreme Court of Ohio having reversed the judgment of the Court of Appeals and having remanded the captioned cause to the Court of Common Pleas for further proceedings in accordance with law, and the office of the Prosecuting Attorney, having indicated a desire to seek a writ of certiorari from the United States Supreme Court, it is the order of this Court that the Defendant be released upon his own recognizance, during the pendency of procedures before the United States Supreme Court.

It is the further order of this Court that the Defendant maintain communication, by correspondence, with his attorney, Jack T. Schwartz, every two weeks during the pendency of further appeals.

Defendant to be released from custody upon filing of his own recognizance bond.

Copies of the above were sent to all parties listed below by ordinary mail on the date of filing.

APPROVED:

.....
WALTER H. RICE, *Judge*

CC: RANDAL A. ANDERSON, JR., Attorney for Plaintiff

JACK T. SCHWARTZ, Attorney for Defendant

(1:55 p.m., November 3, 1972) **(Page 99)**

THE COURT: Mr. Slavens, call your next witness.

MR. SLAVENS: Yes, Your Honor. State will call Detective Lewis Wright.

Lewis Wright,

being duly sworn, according to law, took the witness stand and testified as follows:

Direct Examination

By Mr. Slavens:

Q. Will you state your name please and your occupation? A. Lewis Wright, Detective, Montgomery County Sheriff's Department.

Q. And for how long have you been so employed with the Sheriff's Office? A. Ten years.

Q. And for how long have you been employed as a detective? A. A little over two years.

Q. And were you so employed as a detective on the date of June 22, 1972? A. I was.

Q. And in the detective section of the Montgomery County Sheriff's Office, are you assigned any particular type of complaints? A. Yes. I'm assigned to robberies, all armed robberies and all unarmed robberies. **(Page 100)**

Q. And were you involved as a detective in the—strike that. Do you have knowledge of the arrest or apprehension of an individual by the name of Terry Gallagher? A. Yes, I do.

Q. Do you know when the arrest occurred? A. The arrest occurred in July. I believe it was 18th or 19th, something like that. It was on a weekday night. We had placed a pick-up out on him earlier that day. One of our Harrison crews had stopped him at the Wagoner—at Needmore and Dixie, and I was called out there to make identification.

Q. Now, you say this occurred in June or in July? A. I think it was in July. I think it was after vacation or before vacation. I don't remember.

Q. And, now, do you recall whether or not you ever had a conversation with Mr. Gallagher, sometime after his arrest? A. Well, after the initial arrest, yes. I went out to the scene and identified him. They then took him down to the county jail and incarcerated him on investigation of armed robbery. The next day I called Detective Walsh from the Dayton Police Department, advised him we had him and he came over at that time and an interview was conducted in our interrogation rooms.

Q. When you say our interrogation rooms, you're referring to the Montgomery County Jail Building? A. Yes. detective section. **(Page 101)**

Q. And other than yourself and Mr. Gallagher and Detective Walsh, was anybody else present during the time of — A. Yes. Mr. Helson from the State Parole Office was there also.

Q. And do you know as to how Mr. Helson became aware Mr. Gallagher was in custody? A. Yes, we advised him in the morning around nine o'clock right after roll call, that he was in custody and he came over.

Q. And —

.....

(THEREUPON, State's Exhibit No. 2 was marked for identification.)

.....

Q. Now, on the date when the interview was conducted with the people present you referred to, do you recall whether or not any forms were executed on that day? A. Yes. The usual Rights Waiver was read and explained to him.

THE COURT: Let me back up just a moment, Mr. Slavens. I assume if this is to be a statement oral or written, Mr. Schwarz, that you would have objection to it.

MR. SCHWARZ: If there's going to be an introduction of evidence of a statement, yes, Sir. He hadn't gotten to that point. Just in the Rights Waiver. So, I was withholding my objections until that time.

THE COURT: Let's let the record show that at this time Court has been advised that there will be a statement **(Page 102)** offered, that we are, in effect, no longer on the record as far as the trial on the merits is concerned and we will go into the question of the voir dire or

separate hearing on the question of the admissibility of the statement. I think that discussion concerning the Rights Waiver is pertinent to such a limited hearing and this is why I interrupted at this point.

MR. SLAVENS: Yes, Your Honor.

THE COURT: Go ahead, Sir.

Q. Detective Wright, let me hand you an item which has been marked State's Exhibit 2 for Identification purposes and I'll ask you to state what that is? A. Yeah. This is the pre-interview form used by both the Sheriff's Department and Dayton Police. Right hand corner it has the date of June 22, 1972. Under it, the time of 10:35 a.m. The place would be the Sheriff's detective section. Want me to go all the way through it then?

Q. Yeah. We'll get to that. Is that the form that was—was that form executed on the date of June 22, 1972? A. Yes, it was.

Q. And is that the form that was executed on the date that you, yourself, the defendant, Detective Walsh and I believe Mr. Helson were present? A. Yes, Sir.

Q. That you were referring to? A. Yes. **(Page 103)**

Q. And that was June 22nd? Is that correct? A. June 22, 1972.

Q. And the date that the arrest occurred? Do you recall what that was? A. The date it would have occurred would have been June 21st. I left on the 23rd for vacation, so it was just before.

Q. And will you explain the procedures that occurred —that took place that day? Who arrived from outside the building and when and where, from which did the defendant arrive to the interview room? A. When I—after roll call, I called the—Detective Walsh of the Dayton Police Department and Mr. Helson, both within a matter of minutes, and advised them that we had Terry

Gallagher and at that point they said they'd be over. So I went down to the jail and brought him up to our interrogation room, to our detective section, and upon the arrival of both Mr. Helson and Detective Walsh, we went into the interview room.

Q. Will you describe please the interview room? A. The interview room was five foot by six foot room I suppose. I don't know the size. It has no windows. It has a table. I think there was four or five, maybe four chairs in it that day. It's well lit and it's adjacent to the actual squad room or detective section.

Q. And when Mr. Gallagher arrived was that form explained to him? **(Page 104)** A. Yes, Detective Walsh read it to him.

Q. And when Detective Walsh read him that form, what did Detective Walsh do? A. Well, the first thing he did he filled in the top part with his full name, Terry Francis Gallagher and asked him where he was from and it was Dayton, Ohio. His age, which was 24. Put down he was told by Detective R. D. Walsh of the Dayton Police Department that he went into the Rights under Miranda and asked him, you know.

Q. You were present during this time? A. Yes.

Q. Other than the people that you referred to, Mr. Helson, yourself, Detective Walsh, Mr. Gallagher, did any other person come and go during the interview with Mr. Gallagher? A. During the course of the interview, after the Rights and so on?

Q. Yes, even after the Rights who was there? A. Brought up another inmate by the name of Richard Morgan Sorrell who had been charged previously.

Q. And what procedures did Detective Walsh utilize to explain this form to Terry Gallagher? A. Well, he read each paragraph in it. He also asked him—after he

finished reading it, he asked him first how many years of **(Page 105)** schooling he had, which was ten. Asked him if he was able to read and write and fully understand everything being read to him. And he went through the Rights again and read them to him. He signed—he said he understood and wanted to sign.

Q. Now, what would Detective Walsh do after he completed each sentence or paragraph as you referred to it I believe? A. I believe he asked him if he understood what he just read him.

MR. SCHWARZ: Object to what he believes, Your Honor.

THE COURT: Would SUSTAIN the objection.

Q. Do you recall whether or not that happened or— A. No, I don't recall really.

Q. Okay. After the form was explained to Mr. Gallagher or read to Mr. Gallagher, what, if anything, did Mr. Gallagher do? A. He signed the signature on the bottom right hand corner.

Q. And did—A. He made an oral—he was asked, do you understand what has just been read to him. He did. He indicated he did and signed his name.

Q. And was that form witnessed by you? A. Yes.

Q. And your signature appears thereon? A. In the lower left hand corner. **(Page 106)**

Q. Any other signatures other than yourself's and Terry Gallagher's? A. Detective Walsh's signature.

Q. Were those executed at that time? A. Yes.

Q. And did Mr. Gallagher indicate a willingness to carry on a conversation with you or Detective Walsh? A. Yes, he did.

Q. And how did he manifest that? A. Well, first of all, after he was advised of all his Rights, he said he understood the meaning of everything that he'd been

told. He signed the form, and he indicated that he would talk to us.

Q. All right. And prior to any conversation were there any threats made to him? A. No.

Q. Were any promises made to him? A. No.

Q. Was there any type of coercion used by yourself? A. No.

Q. Were there any type of coercion of any nature utilized by Detective Walsh? A. No.

Q. Now, for the record Sir, would you read the last paragraph of the form, the last paragraph before the number of schooling years. **(Page 107)** A. It says, "with full understanding and knowledge of these rights, I hereby freely and voluntarily waive them by signing my name below. I am willing to answer any questions of my own free will, without force or fear, and hereby state by signing my name below that no threats or promises have been made to me by anyone. I wish to make a free and voluntary statement."

Q. And that was one of the paragraphs read to Mr. Gallagher? A. Yes.

Q. And after that paragraph was read to him is that when—or after that he did sign that particular form? A. He signed it after that. It was completed.

Q. And after the form was executed, and Mr. Gallagher indicated he wished to carry on a conversation, what occurred? A. Well, he signed the form. We witnessed it and then at that point, Detective Walsh began interviewing him in regards to some robberies.

Q. Now, on the time that Mr. Gallagher was being interviewed he had been apprehended by the Montgomery County Sheriff's authorities? A. That's correct.

Q. And during the interview with Mr. Gallagher on the date of June 22nd, was he inquired of as to an armed robbery which occurred at the 7-11 Store on Xenia

Avenue on the date of May 27th? A. Yes, he was. **(Page 108)**

Q. Explain what occurred in reference to that particular armed robbery?

MR. SCHWARZ: Object. We're just on hearing as to the admissibility at this point, Your Honor.

THE COURT: This is the Court's understanding.

Q. Well, for what length of period of time did the interview take place if you can recall? A. They were over in the—they were brought up in the detective section approximately 9:15. He was brought up about 9:15. We took him down in time for lunch which I believe is 11:30. At that point when he was taken down—or I might add when brought down for lunch he was then booked out and turned over to the Dayton Police Department and was taken over to the Safety Building.

Q. All right. This is after the statements were made to him by you? A. Yes.

Q. Do you know for what length of period of time he remained over in the City Safety Building after this interview took place? A. I think it was a day or two, maybe three days. I don't remember really. He was taken over there and charged and arraigned over there and brought back over.

Q. I see. All right. Now, a conversation did take place on June 22nd? A. Yes. **(Page 109)**

Q. And since that date—strike that last question.

Mr. Slavens: I have nothing further, Your Honor.

The Court: Mr. Schwarz, on Cross.

.....

Cross Examination

By Mr. Schwarz:

Q. Detective, I believe you said at the beginning that you went out to pick this fellow up here, Terry Gallagher, on July the 8th or the 9th? Do you recall saying that?

A. Yes, Sir.

Q. Well, is that the date you picked him up or the 21st? A. Just about vacation. It was in June.

Q. It was in— A. I left on vacation on the 23rd which is a Friday.

Q. So you were mistaken as to that first date? A. Yes.

Q. Is there anything else in this statement that you've given with regard to how the Rights Waiver was signed or about the testimony you're going to give as to what was said that you may have made—may have forgot?

MR. SLAVENS: Objection, Your Honor.

THE COURT: Overruled.

A. No.

Q. You're sure? **(Page 110)** A. Positive.

Q. Okay. When'd you get back from vacation? A. I think it was around the 18th of July.

Q. Did you interrogate Terry Gallagher after that? A. Yes, I talked to him.

Q. When was that? A. It was either in July or August. Again we talked to him last Friday and I talked to him last night.

Q. Talked to him last evening. For how long did you talk to him last night? A. For about forty-five minutes.

Q. Does that have anything to do with the statement that's to be presented in this case? A. No. This is entirely different.

Q. How about all the other conversations, did you interrogate him with regard to the incident that's the subject of this trial? A. No.

Q. Never did? A. No.

Q. Didn't discuss that with him last night? A. (nodded no)

Q. Who's Mr. Helson or Hillison? A. He was the adult parole officer who at that time had under his jurisdiction

Kenny Leroy Carter who was also involved and we were looking for. **(Page 111)**

Q. Who was also involved in what? A. Series of armed robbery.

Q. You thought he was involved? Right? He hadn't been convicted of anything at that time, had he? A. No.

Q. So you assumed he was involved? Yes? A. Yes.

Q. You assumed this boy was involved? Right? A. No, we—

MR. SLAVENS: Objection, Your Honor.

THE COURT: Overruled.

MR. SCHWARZ: Goes to the whole purpose.

THE COURT: OVERRULED.

Q. You assumed this boy was involved, too, didn't you? A. From the statements received from—

Q. You can answer yes or no and then explain your answer. Yes or no. A. Yes.

Q. And you thought—you assumed that Dick Sorrell was involved? Right? A. No.

Q. You did not? A. No, we had a statement where he admitted his implication. **(Page 112)**

Q. Well, is that why you brought him up to the room where this boy was? A. I think we brought him up on the recommendation of Mr. Helson.

Q. He was brought up there? Right? A. Yes.

Q. You didn't need to question him any further, did you? A. Well, not—at that point, yes and at that point, no.

Q. Well, you certainly didn't need to question him in the presence of Terry Gallagher, did you?

MR. SLAVENS: Objection to what the term "need" means. Goes to a subjective element.

MR. SCHWARZ: I'll rephrase it.

THE COURT: Didn't hear what you said.

MR. SLAVENS: Objection to the term of what the detective needed.

THE COURT: Is the question withdrawn?

MR. SCHWARZ: Withdrew the question and rephrase it.

THE COURT: No ruling on the objection.

Q. For what reason did you take Dick Sorrell up to the interrogation room where you had Terry Gallagher? **(Page 113)** A. We talked with Terry for a while, and Mr. Helson felt we ought to bring Sorrell up. So, we did.

Q. What did Helson say he thought you should bring Sorrell for? He must have said. A. To either refute or corroborate what was said at that point.

Q. Or to put the heat on this boy and make him come clean up in the interrogation room? Right? That was the purpose of it? A. No, I don't think so.

Q. You don't think it was. Well ,to refute or corroborate what he said would that suggest that you didn't believe him? A. At that point we didn't know who to believe.

MR. SLAVENS: Objection, Your Honor.

Q. So you brought Sorrell up to confront Terry Gallagher up in that—what was that? A five by five or eight by five room? A. It's a small room.

Q. With five people in there? A. There was four, yeah.

Q. Did you tell Terry you better come clean, Sorrell's already made a statement? A. We told him Sorrell had given us a statement.

Q. So you better tell us what happened because Sorrell already gave as a statement? Right? A. Yes. **(Page 114)**

Q. Okay. Didn't you tell these boys both Sorrell and Terry if you cop out on one, we'll drop all these other

robberies? A. Well, from my standpoint of view in the county we could not positively identify Terry Gallagher.

Q. Sir, would you answer my question. If you want to explain you can. But did you or did you not tell these boys if you cop out to one we'll drop all these other robberies? A. I think that was told to them, yes.

Q. In your presence? Right? A. Yes.

Q. Okay. And Sorrell copped out, didn't he? A. He copped out before that. He was charged.

Q. Okay. And then you brought him up to confront Terry Gallagher up in the interrogation room? A. He was up, yes.

Q. And is it your testimony now that wasn't to put the heat on Terry Gallagher? A. They talked together by themselves. He wanted to—

Q. Would you answer my question.

(THEREUPON, the question and answer was read by the reporter.)

A. No, I don't think so.

Q. What was the purpose of it, then? A. Well, at that point Sorrell had indicated he wanted to talk to him, so we let him. **(Page 115)**

Q. Sorrell called up from downstairs and said "bring me up to the interrogation room"? A. He knew we had him in.

Q. Did you tell him? A. Yes.

Q. Well, you sent for Sorrell, didn't you? A. I went down and got him.

Q. You went down and got him. How long had you interrogated Terry Gallagher at that time? A. He'd been in there probably a half hour, forty-five minutes.

Q. And then you went and got Sorrell? A. Yes.

Q. For what purpose? A. On recommendation of Mr. Helson.

Q. For what purpose? A. To let them talk together.

Q. To let them talk together. A. Yes.

Q. Did they talk in your presence? A. No, they asked to be left alone.

Q. Did they ever talk in your presence? A. Yes, they did.

Q. Was Terry Gallagher interrogated in the presence of Dick Sorrell? **(Page 116)** A. I think so but I can't positively say.

Q. You don't positively remember? A. No, I don't.

Q. Do you positively remember what Terry Gallagher said during that interview? A. With Sorrell?

Q. No, just during your entire interview with him about the incident that's on trial here now? A. Yes.

Q. You recall all of that perfectly? A. Not perfectly.

Q. But you're not positively sure if Sorrell or if Gallagher was interrogated in the presence of Sorrell? A. We —they talked, we all went in and we talked to him. Detective Walsh talked to him. It was then decided—it was about 11:15. It was then decided that Sorrell was staying at our jail. We took him down. He checked out of the jail and they went over to the City Jail at that time.

Q. Well, your answer then is "no", you don't positively remember if Gallagher was interrogated in front of Sorrell? Is that your answer? A. I believe there was some questions asked. What they were at that point, I don't remember. **(Page 117)**

Q. How long did you interrogate Terry Gallagher that day? A. Myself?

Q. Yeah. A. Maybe a total of fifteen minutes. Most of it was handled by Detective Walsh.

Q. How long did Walsh interrogate him? A. Oh, probably a total of forty-five minutes, fifty minutes.

Q. And he was upstairs there from 9:15 'till 11:30? Right? A. Yes.

Q. Okay. What happened during the other hour and fifteen minutes or hour and a half? A. Him and Sorrell talked totally for about a half hour and I believe Mr. Helson talked to him for approximately a half hour by himself.

Q. By himself in that room? A. Yes.

Q. Where were you and Detective Walsh and Sorrell while this went on? A. Sorrell wasn't up there at that time.

Q. He hadn't been brought up yet? A. No.

Q. Did anyone during this as you call it, interview or interrogation, say, "well you know if you cop out we will give you a break" to Terry? **(Page 118)** A. Yes. He was told by me that I wasn't going to charge him at that point.

Q. And a lot of those other robberies that you all were interrogating these boys about and told them you'd drop if they copped out, you didn't have sufficient evidence on them, did you?

MR. SLAVENS: Objection, Your Honor to other charges.

MR. SCHWARZ: This goes as to the whole promises made to these persons to get their statements, Judge.

THE COURT: Going to OVERRULE the objection.

Q. Isn't that true? A. No. We could have identified Sorrell in most of them.

Q. Most of them? A. Yes.

Q. Not this boy? Right? A. I don't really know. I didn't attempt.

Q. Okay. You didn't attempt to? A. No.

Q. So you were promising really something that didn't

mean a whole lot because you didn't know if you had anything or not? Right?

MR. SLAVENS: Objection, Your Honor.

THE COURT: OVERRULED.

A. I didn't know how good the witnesses would be, no. I didn't know **(Page 119)**

Q. By the way, was Sorrell charged in this particular incident, the alleged robbery at the 7-11 Club on Xenia Avenue on May the 27th? A. I don't really know.

Q. You don't know? A. No.

Q. Isn't it a fact, Detective, that you took Sorrell and Gallagher up there at the same time? Or, do you remember? A. I may have. I don't know. I think—

Q. You don't know? A. They were up there together.

Q. One other question. You already had a statement from Sorrell, though? Right? A. Yes.

Q. So there was no need for you to further interrogate him, right, because you had your statement out of him? A. Most of the statement, yes.

Q. All right.

MR. SCHWARZ: That's all. Thank you.

THE COURT: Mr. Slavens?

Redirect Examination

By Mr. Slavens:

Q. I believe you were asked a question about a conversation **(Page 120)** you may have had with Mr. Gallagher in August. Is that correct? A. In July or August.

Q. And where did that conversation take place? A. That would have been in our building, detective section.

Q. And was that in reference to which offense or rather was that in reference to this particular offense? A. No.

Q. And I believe you were asked the question "did you interrogate him." Did you ever interrogate him that day as opposed to asking him questions or statements? A. Which day?

Q. Oh, the time in August.

MR. SCHWARZ: Judge, I went into that and asked him. I have an objection. Asked him if he interrogated about these things and he said no. So, if it doesn't pertain —well, I'll withdraw the objection.

THE COURT: No ruling then.

Q. Did you have a conversation with Mr. Gallagher in the month of August or sometime after-- A. After July 18th.

Q. After June 22nd, after this conversation? A. Yes.

Q. Where then did that—we'll call that the second conversation— A. Took place in our building, the detective section.

Q. And just so we have the record correct, did any statements **(Page 121)** or any facts in reference to this particular 7-11 robbery come out during that time? A. No.

Q. Now, during the time that Mr. Gallagher was in the interview room on June 22nd, 1972, other than statements made by him to you reference to the armed robbery at the 7-11 Store, did you state that there were other matters discussed? A. Yes, in reference to what my pertinent interest was as far as the county.

Q. All right. And after that, do you recall whether or not Mr. Gallagher made any statements to the effect that he would contest this matter? A. Yes, he said he was going to go to trial. You mean on the 22nd now?

Q. Yes. A. No, nothing on the 22nd.

Q. Did he make any statements similar to that one I asked earlier on a later date?

MR. SCHWARZ: I'm sorry. I don't even understand the question now, Judge.

THE COURT: I'm not sure I do either. Back up a step or two and rephrase it.

Q. During any of your conversations with Mr. Gallagher, did he ever make an indication to you that he would contest this matter? **(Page 122)** A. Yes.

Q. Now, just when did that occur? A. It was the interview you classify as the second interview.

Q. Can you recall what his statement was to you?

MR. SCHWARZ: Judge, I'm going to object. I don't know that this has anything to do with the admissibility of the statement made on the 22nd of June of this year.

THE COURT: SUSTAINED.

MR. SLAVENS: I believe that's all I have of this witness, Your Honor.

MR. SCHWARZ: No Recross.

THE COURT: Thank you, Detective.

MR. SLAVENS: Now, going into the motion and the matter of the admissibility of the statement, we have another witness.

THE COURT: Call your other witness.

MR. SLAVENS: State will call Detective Walsh.

.....

R. D. Walsh,

being duly sworn, according to law, took the witness stand and testified as follows:

Direct Examination

By Mr. Slavens:

Q. State your name please and your occupation. A. R. D. Walsh, Detective, Dayton, Ohio Police Department. **(Page 123)**

Q. And you are a detective. Are you assigned to any particular type of complaints? A. Robbery Squad.

Q. And were you so employed on the month of June, 1972? A. Yes, Sir, I was.

Q. How long have you been a detective with the Robbery Squad? A. On the Robbery Squad, approximately six years.

Q. And how long have you been a detective with the Dayton Police Department? A. Since 1955.

Q. Now, directing your attention to the date of June 22nd, 1972, I'll ask you if you on that date visited the building known as the Montgomery County Jail Building? A. Yes, Sir.

Q. And what was your purpose for going there? A. Lou Wright—Detective Lou Wright, Sheriff's Office, called and stated that they had in custody one Terry Gallagher whom (*Sic*) was wanted on a broadcast by the Sheriff's Office.

Q. And did you go over to the—so, then you went over to the County Jail Building? A. Yes, Sir, I did.

Q. And when you arrived there, where did you go and what did you do? **(Page 124)** A. Went to the detective's office, second floor, in Montgomery County Jail.

Q. And when you arrived on that second floor, who did you visit? Who did you see and what did you do? A. I talked with Detective Wright originally. He reiterated that they had Gallagher in jail and that he was a suspect for some armed robberies in the county along with a Richard Sorrell, who'd already been arrested and currently in custody.

Q. All right. And after speaking with or seeing Mr.—Detective Wright, who else did you see that day? A. I saw the parole officer Jerry Helson. I saw all the other detectives and Richard Sorrell and the defendant.

Q. When did you first see Terry Gallagher? A. Approximately 10:00 a.m. on the 22nd.

Q. All right. And when you're referring to Terry Gallagher and you have referred to him as the defendant, I'll ask you to examine the courtroom and see if he's here today, that individual? A. Yes, Sir, sitting along side Mr. Schwarz, at the counsel table.

Q. Indicate for the record what he's wearing today? A. White shirt, lavendar trousers, long hair and mustache.

Q. Indicating the defendant. When you saw Mr. Gallagher on the date of June 22nd, 1972, what did you do? What occurred after your visit with or during your visit with him? A. With who now? **(Page 125)**

Q. Terry Gallagher. A. First I introduced myself. Informed him that he was a suspect in some armed robberies. Read him a pre-interview form prescribed by the Prosecutor's Office, read it to him, outloud. After each paragraph I asked him if he understood. He stated he did; finally, he affixed his signature at the prescribed place, along with Detective Wright's.

Q. Now, I'll hand you what is marked State's Exhibit 2 for identification purposes and I'll ask you to state what that item is? A. This is the pre-interview form that I had reference to.

Q. And is that the one that was executed on the date of June 22nd? A. Yes, Sir. 1972. 10:35 a.m.

Q. Prior to that date, had you ever had any contact with Terry Gallagher, yourself? A. No, Sir. I never saw him before to my knowledge.

Q. And did you indicate that form was read to and explained to Mr. Gallagher in its entirety? A. Yes, Sir, I did.

Q. And how fast—or how did Mr. Gallagher act

during the time his Rights were being read to him? A. Very normal, nothing erratic. **(Page 126)**

Q. Did he indicate to you—did he indicate to you that he was, shall we say, druggish or sleepy or tired? A. No, Sir.

Q. Did he indicate to you an awareness as to what was happening? A. Yes, Sir. He stated he understood what I read to him.

Q. And were any threats made to him? A. No, Sir.

MR. SCHWARZ: Objection, conclusionary. Withdraw the objection.

THE COURT: Be no ruling then.

Q. Other than your reading that particular form to Mr. Gallagher and prior to a conversation with Mr. Gallagher, did you make any other statements to Mr. Gallagher? A. Could you repeat that please.

Q. You read the pre-interview form to Mr. Gallagher? A. Yes, Sir.

Q. And a conversation took place? Is that correct? Let me strike this again. Did a conversation take place between you and Mr. Gallagher? A. Yes, Sir.

Q. And that conversation took place after the pre-interview form was executed? A. Yes, Sir. **(Page 127)**

Q. Now, during the time, did any interval elapsed (*Sic*) between the time the pre-interview form was signed and the conversation took place, about the subject matter in question at that time, did you make any statements to Mr. Gallagher? A. No, Sir. The form was executed and signed practically all the same time. The conversation was after that.

Q. All right. Now, what was the first question asked of Mr. Gallagher after the form was executed? A. It would have to be a standard question. I don't have com-

plete recall but probably asked him if he was involved in any robberies in the City.

Q. And did—after being asked that question, did Mr. Gallagher indicate to you a willingness to answer your question? A. Yes, Sir. He'd (*Sic*) answered he was not at that time.

Q. All right. And during the conversation with Mr. Gallagher, did statements in reference to the 7-11 armed robbery on Xenia Avenue come forth? A. Yes, Sir.

Q. Did you, after the interview, transport Mr. Gallagher over to the Safety Building? A. Yes, Sir.

Q. And the purpose of that was what? A. For a—the incarceration and process of the prisoner in the Municipal Court system to be arraigned on a felony charge of armed robbery. **(Page 128)**

MR. SLAVENS: I believe that's all I have of this witness.

THE COURT: Mr. Schwarz, on Cross.

.....

Cross Examination

By Mr. Schwarz:

Q. Who all was present, Detective Walsh, when you interviewed Terry Gallagher? A. At the time of the execution of the form?

Q. During the whole interrogation. A. This covered a span of time whereas Detective Wright, Mr. Helson, Richard Sorrell, myself was present on different occasions.

Q. Were all of you present during some of it? A. Yes, Sir.

Q. Was Sorrell brought up at the same time as Terry Gallagher or was he brought up later? A. I saw Sorrell first and talked with Sorrell first.

Q. Did anyone tell Terry Gallagher over here (*Sic*) "Sorrell's already copped out, so you might as well cop out, too? You might as well speak up and admit it" or words to that effect? A. I informed Mr. Gallagher that Sorrell had implicated him on some of the robberies Sorrell was charged with.

Q. Some. Other ones, but not this one? Right? A. Yes, this one included. **(Page 129)**

Q. This one included? A. Yes, Sir.

Q. And you also indicated to Mr. Gallagher that some of these were Federal cases, didn't you? Federal raps? A. No, Sir. That was volunteered that they had some checks from someone in Troy, which would be under Federal jurisdiction.

Q. And didn't you tell them if they went Federal, they'd have to go through the Federal Court if you charged him here, they'd have to face one armed robbery here and if they'd cop out or someone else? A. That's what I told them.

Q. What did you tell them about copping out to one charge? A. As far as copping out I didn't tell them anything. Of their own freewill. (*Sic*)

Q. Okay. Entering a plea of guilty? A. I didn't mention entering a plea of guilty.

Q. You never did? A. No, Sir, I did not.

Q. Did you mention anything about only charging them with one charge and dropping other charges or not charging them with others? A. I agreed that we'd only charge him once, yes, Sir, as far as the City was concerned.

Q. You made him aware of the fact that he could be subject to Federal prosecution, didn't you? **(Page 130)** A. No. He made me aware of this fact.

Q. Didn't you tell him that's a Federal rap? A. What?

Q. The checks out of Troy. A. He told me he had some checks out of Troy.

Q. Did you tell him that's a Federal rap? A. Yes, Sir. I said that's a Federal violation.

Q. If they charged him on that you told him it was a Federal rap? A. He indicated he stole some checks from the mail.

Q. Just answer my questions. You don't have to put in the statements. Read the question back and ask him to answer yes or no. I realize this is an experienced witness and I don't need that given me.

(THEREUPON, the last question and answer was read by the Reporter.)

Q. You told him it would be a Federal rap? Yes or no. A. No.

Q. You did not tell him that? A. I did not use the terminology "rap".

Q. You told him it would be a Federal offense, the checks would be? A. It is a Federal offense, yes.

Q. It is a Federal offense, yes? A. Yes, Sir. **(Page 131)**

Q. Right. Would you describe your conduct when you walked into the interrogation room there? Withdraw that question. Isn't it a fact you walked into the interrogation room and threw a warrant down in front of Terry Gallagher here and said now I'm going to read your Rights to you? A. Definitely wrong.

Q. Definitely wrong. No offer was made by anyone to only charge this man and Sorrell with only one offense if they'd plead guilty to that offense? Is that right? A. Not to plead guilty, no, Sir.

Q. What was the deal? A. For the admission of the particular offense, namely the 7-11 Store on Xenia Avenue.

Q. If they made an admission to the robbery to the 7-11 on Xenia Avenue on May the 27th, the other charges

wouldn't be prosecuted- Is that right? A. What other charges?

Q. The other ones that you were discussing with him, the other robbery cases? A. Other robbery cases I can vouch for, yes, Sir.

MR. SCHWARZ: That's all. Thank you.

THE COURT: Mr. Slavens? **(Page 132)**

Redirect Examination

By Mr. Slavens:

Q. In reference to the statement made to you by Mr. Gallagher in reference—about the stolen checks, how did that transpire? What occurred? A. He called me over to the County Jail sometime after the preliminary hearing of this particular robbery we're in Court on today.

Q. Well, did the matter of the stole (*Sic*) checks, Is that when you first became aware of them?

MR. SCHWARZ: Object, leading.

THE COURT: SUSTAINED.

Q. When did you first become aware of the fact that the defendant was involved in some stolen checks, cases out of Troy, Ohio?

MR. SCHWARZ: Object. I don't know there's any such fact, Your Honor.

THE COURT: I believe this was testified to on Cross. We're going to allow the question. Objection OVERRULED.

A. Repeat the question, Sir.

Q. We'll reword it and distract (*Sic*) the word "fact". When were you aware by the defendant that he may be involved in some checks out of Troy, Ohio? What day? **(Page 133)** A. This was the same date of the interrogation of the robbery of the 7-11 Store.

Q. And what transpired in reference to that? A. The check cases.

Q. What was the conversation between you and Mr. Gallagher? A. He called me to the County Jail or the City Jail to ask me what would or could be done reference these check charges. I told him I would ask the Federal authorities to interview him to get it firsthand. Now, at the preliminary hearing, I sat down with Mr. Gallagher and told him I'd been informed by the Federal authorities they would not pursue prosecution of the check charges. This was of their own volition and not mine. I had no influence in it at all. No promises or anything else made by me. I told him I'd contact Federal authorities and apprise them of the fact that he was telling me of the checks.

Q. On the date of June 22nd, when the interview occurred, with Mr. Gallagher, yourself and Detective Lou Wright, what was the discussion then about the stole (*Sic*) checks or the checks from Troy, Ohio, and the fact that that was a Federal offense? A. This was just mentioned by the defendants during the interrogation and the admission of the other robberies and they wanted to clear up everything, including the check charges, any possible check charges. **(Page 134)**

Q. Okay. They volunteered that information to you? A. Yes.

MR. SCHWARZ: Object to "volunteer".

THE COURT: SUSTAIN the objection.

Q. To your knowledge, has Mr. Gallagher been charged with any other armed robberies as a result of the conversation you had with him on June 22nd, 1972?. A. Not as a result of that conversation, no, Sir. The City did not. I'm reasonably sure not the County.

Q. During the conversation that you had with Mr.

Gallagher did Mr. Sorrell make any statements to you? A. Yes, Sir.

Q. And to the best of your knowledge, Mr. Sorrell has not been charged in this particular armed robbery, has he? A. He has not, that's correct.

Q. At the time Mr. Gallagher was being questioned, had he been—he was arrested for that one particular armed robbery? A. Mr. Gallagher, you're saying?

Q. Yes. A. He was arrested on a broadcast by the Sheriff's Office for suspected armed robberies in their bailiwick.

Q. At the time the conversation took place on June 22nd, had Mr. Sorrell been charged with any robberies or armed robberies? **(Page 135)** A. I can't truthfully answer that if he was charged or not. He was not by the City, definitely.

MR. SLAVENS: I believe that's all I have, Your Honor.

THE COURT: Mr. Schwarz?

Recross Examination

By Mr. Schwarz:

Q. Detective Walsh, let me refresh your recollection and ask isn't it a fact that Sorrell had already been sentenced the day prior to your interrogation of Gallagher, had been sentenced in the Common Pleas Court of this particular Court prior to the day you interrogated Mr. Gallagher? A. I—we came and got Sorrell. I don't know if it was from a new charge or an old charge he was on. I believe A.P.B. at that time. I don't know honestly if he was charged at that time on a new charge or not.

Q. You say these men indicated they wanted to clear all these robberies up. Is that what you said? A. Yes, Sir.

Q. Isn't it a fact either you or Detective Wright or

both said why don't we clear up all these things and take care of all of them today or words to that effect?

MR. SLAVENS: Objection, Your Honor.

THE COURT: OVERRULED. **(Page 136)**

Q. Isn't that true?A. Not in the way you put it, no, Sir.

Q. Well, tell us how it was put? A. We—you've got to understand we talked with them firstly. We tell them they're going to be charged. To get everything off the books they've done and go into Court with clear conscious.

Q. Kind of clears up your paper work, doesn't it? A. Definitely, which I'm very much interested in.

THE COURT: Further questions, Mr. Schwarz?

MR. SCHWARZ: No, Sir.

THE COURT: Detective, let me ask this just to make certain that I've followed the testimony. Are you indicating that you and or Detective Wright told Mr. Gallagher that if he would admit or give a statement on the 7-11 matter that there would be no further charges? A. Not exactly like that, Your Honor. We were stymied as to which charge we will charge them on of the numerous places they'd admitted robbing. It was agreed with the County that Lou Wright would charge Sorrell with the one. Maybe already charged. That's the reason no additional charges were filed. I agreed to file one on Mr. Gallagher. But not with the stipulation they come out or whatever. **(Page 137)**

THE COURT: Well, regardless of what you and Detective Wright might have agreed on, what did you communicate to Mr. Gallagher in this regard? A. This is, in effect, what we told him. We'd only file the one charge. Said would be fine. Later he said he wanted to take his chance in Court to beat it.

THE COURT: In other words, I'm trying to get the

chronology and specifically what you say. Prior to his giving the statement you told him if he'd give the statement there would only be the one charge filed. I don't want to put words in your mouth. I am interested in the chronology and what was said. A. I'm at a loss as to how to relate to you what it means to us. One charge, it's a whole lot less effort on everyone's part if we file the one charge and we know he's responsible for the others. All incorporated in our report to the Court or to the Probation Department. Therefore, make into one ball instead of having three or four loose ones later on being subjected to be prosecuted on. We've got to passify (*Sic*) the complainants, you understand.

THE COURT: I understand that. I've got no quarrel with that. Not commenting on that one way or the other. I'm simply asking you what you told Mr. Gallagher? A. He indicated a willingness to tell us about this particular robbery with no other charges and I guaranteed him I would not file any additional charges. **(Page 138)**

THE COURT: Okay. Mr. Slavens, based on that, are there any further questions.

Further Examination by the State

By Mr. Slavens:

Q. Was it Mr. Gallagher who asked you to file one charge and he would proceed with the conversation reference to the other armed robberies? A. Yes, Sir. This is the one I was more interested in.

Q. What did Mr. Gallagher say to you to begin his conversation about the one charge only being filed against him? A. He was very sceptical (*Sic*) there would only be one charge. Said he'd been railroaded before by some other county. This is why he was reluctant to admit

to anything. Some policeman, parole officer north of here that promised him one thing and done the opposite.

Q. So he—is it true then he initiated the concept of only one charge being brought against him for his statement?

MR. SCHWARZ: Object.

THE COURT: SUSTAIN. Let the Court ask the question, Mr. Slavens. Did you state to Mr. Gallagher that if you admit the 7-11 matter, we'll only charge you once or on the other hand did Mr. Gallagher say to you if you'll only charge me once I will give this statement? Which was it? A. It was the latter. Mr. Gallagher expressed a willingness to give an admission to the robbery. **(Page 139)**

THE COURT: Mr. Slavens?

MR. SLAVENS: Nothing further, Your Honor.

THE COURT: Mr. Schwarz.

Further Examination by the Defense

By Mr. Schwarz:

Q. This giving an admission or willingness to give an admission was after he'd been informed if he did so he wouldn't be charged with the other matters, wasn't it? A. No, Sir, he's the one that approached it and wanted to deal.

Q. He said you guys drop all these others, I'll give you an admission on the 7-11 matter because it looks like that's the one you're interested in? Is that what he said or words to that effect? A. I wouldn't say that's what he said. It was along that avenue, yes, Sir.

Q. And he initiated this whole let's make a deal? A. Yes, Sir, he approached it.

Q. How did he approach it? A. He and Sorrell was in

a room together for a while and this is when it came about, after he and Sorrell talked.

Q. After he came out and who'd he make that statement to? You or Detective Wright? A. I believe Wright was with me. I was there, Sorrell was there, the defendant. **(Page 140)**

Q. And isn't it a fact that you did make a statement to Gallagher if you give us an admission on the 7-11 robbery that's the only one we'll charge you with? A. This was after he expressed to us this is what he wanted to do.

Q. I didn't ask you that. Didn't you make that statement to him? A. No, I agreed to it.

Q. Did you say it like I say it or words similar to it? A. No.

Q. All you said "okay, I'll go along with your deal"? A. Yes, Sir.

Q. But you were giving him a deal? A. No. I was giving him a break.

Q. Same difference. A. I don't think so.

Q. You were giving him a break. Okay.

MR. SCHWARZ: That's all.

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MR. SCHWARZ: It think there's more involved here than the Miranda decision and I think the prosecutor mentioned the word in the last part of his statement. I think the test not only is the one—has the person been sufficiently advised of his Constitutional Rights and has he voluntarily waived the right to counsel, which is all that gets to. But, it's a matter of the Court considering the totality of the circumstances, which is a very old case, the Supreme Court case I believe of *Pouco vs, U.S.* It's about thirty years old. This was the test until the time of Escobedo (*Sic*) and Miranda. **(Page 143)**

Concerning the circumstances in this particular instance, the fact the defendant has in fact signed a Waiver, stating he wishes to make a voluntary statement or in this case, it doesn't go necessarily to the admission that was apparently made or the statement made to Detective Walsh and Detective Wright. As Detective Wright indicated, these boys were confronted with several armed robberies in which they were supposedly implicated and an offer was made, according to Detectives Wright—Detective Wright's testimony and according to the early testimony of Detective Walsh an offer was made. If you give us an admission in this case of the 7-11 Robbery, we won't charge any other cases. It's interesting to note that the advice of the detective or the counseling that those check cases were Federal cases was also discussed at this time and a later denial on the part of the Federal people to prosecute. Of course, this I think enters into the Court's consideration or should enter into it at this time.

The Court I think should consider the fact that they had interrogated this man. He was then confronted with a person known as Dick Sorrell who had already, they said, given a statement implicating this person, before he gave, they say, an admission.

The only, whole question goes not only to the Court considering the totality of the circumstances, but the **(Page 144)** voluntariness of the statement and what induced that willingness or voluntariness to make a statement. It's my position that the statement offered or the statement made was given in exchange for some consideration of not being charged with offenses as Detective Wright admitted that probably couldn't have been proven anyhow. This is mentioned in the Miranda case. Miranda versus Arizonia, statement of the Court that the voluntariness shall not be induced by coercion or trickery or the subtle uses of different methods by the interrogat-

ing police departments. I think this case is a perfect example of what the Court meant in that situation. These statements are not to be induced by promises of dropping other charges or whatever. If they're voluntarily made, they're supposed to be made subsequent to the reading of a Rights statement, a Waiver of same and then the direct questions. Not getting that Waiver signed as a formality of police and Court procedure and then proceeding to violate everything it means. But, in fact, ???ing it signed, asking the questions at this point and not then employing the very mechanics that that thing was designed to do away with. Thank you.

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(Page 145)

THE COURT: Thank you. Gentlemen, coming on to rule on the admissibility of the statement allegedly given on I believe the 22nd of June for which we have had a hearing, the **(Page 146)** Court will rule that the statement or statements are suppressed and, therefore, inadmissible. The Court feels that regardless of whether the promises was initiated by the officers as Detective Wright's testimony seems to imply or initiated by the defendant, as Detective Walsh's testimony indicated, it appears that this defendant when giving this statement did act or operate under promises of leniency, and, therefore, the Court feels that such action, which we feel could have been avoided by the officers in question, constitutes an involuntary statement and the Court, therefore, will decline to receive it.

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Bill Sykes,

being duly sworn, according to law, took the witness stand and testified as follows:

Direct Examination

By Mr. Slavens:

Q. Will you state your name please. A. My name is Bill Sykes.

Q. What is your age? A. I'm 26.

Q. And are you employed, Sir? A. Yes, I'm employed by the State of Ohio, the agency of the Adult Parole Authority.

Q. And during your employment, have you become acquainted with an individual by the name of Terry Gallagher? A. Yes. Mr. Gallagher was placed under my parole supervision when he was paroled from the Lebanon Correctional Institution on February 22nd. 1972.

Q. And since that date, February, did you say 22nd? A. Yes, 1972.

Q. Have you had occasions wherein you met with and counseled with Mr. Gallagher? A. Yes, many occasions.

Q. On the date of June 26th, did you have an occasion to visit or meet with Mr. Gallagher? **(Page 148)** A. Yes. After Mr. Gallagher was arrested, I went to the Montgomery County Jail for initial interview to see what the circumstances of the arrest were.

Q. Did you go to the place wherein you visit Mr. Gallagher under anybody's direction or do that on your own? A. It's part of my job when one of my fellows gets arrested, I'm to interview him and see what his circumstances are.

Q. And did you visit with Mr. Gallagher on the date of July 3rd, 1972? A. Yes, I did.

Q. On the date of July 3rd, how would you describe at that time your relationship with Mr. Gallagher? Was it a cordial relationship? A. Well, it was you know, considering the fact he was in jail, I guess it was normal. It wasn't a hostile or belligerent or anything like that.

Q. All right. I'm not talking about the visit, but your relationship? A. During parole superivision?

Q. Yes. How was that? A. It was fairly—well, it was normal. Terry—

Q. Was— A. —confided sometimes in me and other times it was **(Page 149)** superficial. But, it was, I don't know, it was kind of normal relationship parolee-client relationship, parole officer-client relationship. There wasn't a lot of you know, wasn't a lot of belligerence. We had a fairly decent rapport in other words, fairly decent.

Q. What occurred on the date of June 26th when you visited Mr. Gallagher? A. Well—

Q. What did you do when you first saw him? A. When I first you know saw him, I asked Terry if he would tell me what the circumstances surrounding the arrest were.

Q. Okay. A. That's usually the approach I make.

Q. And what did he say?

MR. SCHWARZ: Your Honor, I'm going to object at at this time. As prior to this person testifying as to any statements, I would like to have opportunity to conduct a special voir dire examination of him, with several things in mind. I would point out now or during the course of the voir dire examination—

THE COURT: What are the matters you have in mind, Sir?

MR. SCHWARZ: I want to raise the issue of **(Page 150)** the privileged communications or what I feel to be privileged communications between a parole officer, who is a, in fact, in one respect, an arm of the penal and judicial system of this State and is, in fact, although not a duly designated or authorized police officer, is a gentleman of the State and not of the State as such, but of the penal authority of the State. I feel there's a—of necessity a privilege as to communications between the parolee

and the parole officer, that must be respected in order for the parole officer and for the parolee to have any sort of communication or line of communication open, which makes it possible both for the parole officer and for the parolee to be able to communicate with regard to matters that may affect his continuance on parole or his being returned to the penal institution, in fact, his whole rehabilitation. I wish to raise that privilege and I wish to raise the confidential nature of the privilege and I wish to take advantage of the privilege, not on behalf of the parole officer but on behalf of my client.

THE COURT: These are the matters you'd hope to bring out in a voir dire examination?

MR. SCHWARZ: That's correct, Sir.

THE COURT: I understand the theory you are advancing, Mr. Schwarz. However, this being privileged relationship has not yet found sanction under the law. So I must OVERRULE your objection. **(Page 151)**

MR. SCHWARZ: Thank you, Sir.

THE COURT: Go ahead, Sir.

Q. And on the meeting with Mr. Gallagher, on July —excuse me, June 26th, what did, if anything, Mr. Gallagher state to you. Explain, please you know just what occurred at that meeting. A. Well, on June 26th he said at that time he didn't want to make any statement in regard to the circumstances surrounding the arrest.

Q. All right. What did you do then? A. Well, I said okay and I left and I came back at a later date to see if he wanted to tell me anything more than he told me before, which wasn't anything.

Q. When did you return then? A. July 3rd.

Q. And that's 1972 of course? A. Right.

Q. Approximately eight days later? A. Yes.

Q. And, again, you went there at your own discretion or your own? A. Part of my—

Q. Part of your voluntariness? A. Part of my job. **(Page 152)**

Q. Part of your job. You weren't directed by any authorities to go there? A. No one in particular told me to do that. That's part of my job to try to get some type of statement, some type of reason, et cetera, something I could work with, either way.

Q. And on the meeting of July 3rd, 1972, what did you do and what occurred? Explain to us the details of that meeting please. A. Well, at the July 3rd interview, I think because you know Terry, you know, we did have a fairly good rapport and I don't know why he did it, he just tell me—told me, in regard to the—well, felony he's accused of—

Q. If I might interrupt. A. On this armed robbery.

Q. On the date of July 3rd, any inquiries made by you or any statements made by the defendant or excuse me, Mr. Gallagher in reference to an armed robbery which occurred on May 27th, specifically? Specifically a 7-11 Store located at 405 Xenia Avenue. A. Yes.

Q. In other words, he made statements to you in reference to that particular incident? A. Yes, he did.

Q. What did he say to you?

MR. SCHWARZ: Raise the same objection for the record, Your Honor, for the same reasons.

THE COURT. Same ruling, Sir. The objection **(Page 153)** would be OVERRULED.

Q. You may continue with your answer. A. He told me that he, along with Dick Sorrell, went into the 7-11 Store on Xenia Avenue, and robbed it, using 1961—

MR. SCHWARZ: Object to the term "robbed" unless that's the exact term this defendant used, Your Honor.

THE COURT: Mr. Slavens, clarify this for us. The ruling will be held in abeyance.

Q. The terminology you're now using is that the language used by Mr. Gallagher in his statement to you? A. The statement he gave me was verbal.

Q. Right. But the terminology. A. And I wrote down what he gave me and—

Q. Well, specifically. A. And I would have to check my other notes to see. This was typed. I dictated this and this was typed from my notes, and, generally, I put down the same word my client uses, yes.

Q. All right. A. So, I'd say in all probability it was the same word.

Q. Okay.

MR. SCHWARZ: Same objection, Your Honor.

THE COURT: The objection would be OVERRULED.

Q. You may continue with what Mr. Gallagher said to you? **(Page 154)** A. Okay. He said he went into the store and robbed it, using a 1961 blue Ford station wagon, which he, Mr. Gallagher, borrowed from Clark Evans of 144 Valley Street, Dayton, Ohio. Terry said that both he and Sorrell had weapons. Terry said he had a .22 caliber automatic, black with brown handle, which he bought in bar called the "Den" on North Main Street. Terry said he bought this weapon approximately two months ago. However, about three days ago before he was arrested, he threw this gun into the river. Mr. Gallagher also told me that he bought a .30 caliber automatic at Joey's Bar on North Main Street, Dayton, Ohio, from a person unknown and according to Mr. Gallagher this pistol had been found by the police, being traced back to him through fingerprints. Also, Terry related that Dick Sorrell had used a .25 caliber automatic which was solid

black in color. And this is all the statement he made in regard to this robbery that he's charged with.

Q. Okay. The conversation that you had on July 3rd it continued, it did not terminate there but was that when the statement was given to you by Mr. Gallagher in reference to that particular 7-11 Store. Yes or no please. A. There was a little bit more in regard—in reference to this robbery.

Q. What was there additional, if any, said to you by Mr. Gallagher? A. Well, in reference to this robbery, well, he didn't exactly **(Page 155)** say there were other robberies involved—

MR. SCHWARZ: Object to any other robberies or anything of that nature, Your Honor.

THE COURT: We're going to SUSTAIN the objection at this point, Mr. Slavens. Your area is proper if you want to see what, if anything else was said about this particular offense, however.

Q. Without going into the other discussion or any respects of the discussion which you had with Mr. Gallagher in reference to any other matters that you may have interviewed Mr. Gallagher about, what, if anything, additional did Mr. Gallagher say to you in reference to the 7-11 Store on Xenia Avenue? Confine your answer to that one particular date? A. Well, in reference to that robbery, something else was mentioned and this was that a brown wig and sunglasses were used as a disguise.

Q. Did Mr. Gallagher tell you as to how the wig or the sunglasses were used or worn by whom? A. Well, he said he received the wig from Kenneth Carter who, according to Mr. Gallagher had several wigs of his own.

Q. Did Mr. Gallagher indicate to you who wore that particular object? A. Well, he said hisself, he used the wig in reference to this particular robbery. **(Page 156)**

Q. Did he indicate to you who wore the—did you say sunglasses? A. Yeah. It was brown wig and sunglasses.

Q. But did he indicate to you who wore the sunglasses? A. Yes; he did, Mr. Gallagher.

Q. Where there any other statements made to you by Mr. Gallagher in reference to this particular offense on 7-11 Store on Xenia Avenue? A. No.

Q. After the completion of that interview, what did you do? A. Well, I—after the completion of the interview, I asked him why he committed this offense.

Q. Okay. A. But then I left you know.

Q. Did he give you any answers to that?

MR. SCHWARZ: Object.

THE COURT: OVERRULED.

Q. Did he answer your question as to why he committed this particular offense? A. He gave me a statement, yes.

Q. Well—

MR. SCHWARZ: Same objections, for the record.

THE COURT: We'll OVERRULE the objection, Sir. **(Page 157)**

THE COURT: If you'd like, we'll show a continuing objection to this questioning.

MR. SCHWARZ: Thank you, Sir.

Q. He did answer your question as to why he did that? A. Pardon.

Q. He did answer your question, without going into it, he did make an answer to you? A. Yeah, he did give me a reason for this particular offense.

MR. SLAVENS: I wonder if Mr. Schwartz and I may approach the bench.

(THEREUPON, Mr. Schwarz and Mr. Slavens approached the bench and no record was made.)

Q. After discussing this particular matter with Mr.

Gallagher, did you ever make an attempt to locate the wig that he referred to? A. Yes, I did.

Q. What did you do in reference to that?

MR. SCHWARZ: I'm sorry. I didn't hear the last question and answer.

(THEREUPON, the next to the last question was read, the last answer was read and the last question was read.)

MR. SCHWARZ: Your Honor, at this time I'll ask that the witness close up all those notes he's reading from and give us some independent recollection. During all the testimony he has been reading notes so far. **(Page 158)**

THE COURT: I think this is well taken, Mr. Slavens. Care to have the witness refer to notes you may lay the proper foundation.

MR. SLAVENS: Yes, Your Honor.

Q. Well, still in reference to my last question what, after the interview, did you do in reference to the wig that was discussed? A. Well, I went to the last known address of where Mr. Gallagher was living and I interviewed the person who lived in the apartment that Terry was living at the apartment with this particular person. Well, person or persons, but when I went there this particular person was there and I talked to her.

Q. When you left that residence, did you take anything with you? A. Yes, in my conversation with her—

MR. SCHWARZ: Object to any conversation with the third person.

THE COURT: Well, at this particular point in time, I don't know whether he's going to go into the conversation or another direction. OVERRULE the objection at this point.

Q. You did have a conversation with the person there? A. Yes.

Q. Without going into that conversation when you left,

what did you take with you? A. I took a wig with me. **(Page 159)**

Q. And where—did you—from where did you get the wig? A. This person that I talked to gave it to me.

Q. What was the person's name? A. Her name was Linda Smith. I can check my records and get the correct—make sure it's the correct name.

Q. Is that the name she told you? A. Yes. Plus it was on her mailbox.

Q. And what was that address? A. 144 Valley Street. Again, I can verify it in two seconds.

Q. What did you do with the wig? A. Well, I took the wig—what can I tell you? Why I took the wig?

Q. Well, why'd you take the wig? A. She said—

MR. SCHWARZ: Object.

THE COURT: OVERRULED at this point.

Q. Why— A. The reason why I took—is it all right?

Q. You may answer the question. You may answer the question. A. I'm sorry. The reason why I took the wig is because she said it was the property—

MR. SCHWARZ: Object to whatever she said.

THE COURT: We would SUSTAIN the objection. You can't get into conversations had with other people, Sir. A. Okay. **(Page 160)**

Q. All right.

(THEREUPON, State's Exhibit No. 3 was marked for identification.)

Q. Sir, let me hand you an item that's been marked State's Exhibit 3 for identification purposes and ask you to state what that is? A. That's the wig that I took and I believe I put it in that bag which should—

MR. SCHWARZ: Object to what he believes.

THE COURT: SUSTAIN the objection.

A. This is the wig.

MR. SLAVENS: Nothing further, Your Honor.
THE COURT: Mr. Schwarz?

Cross Examination

By Mr. Schwarz:

Q. You said there was a—he told you he was wearing a brown wig and sunglasses? Is that correct? A. Yes, Sir.

Q. Did he actually say "Bill, we robbed this place, man." Is that what he said? A. He gave me more detail than that.

Q. Did he? A. Yes, Sir.

Q. What did he say? **(Page 161)** A. He said that he and Sorrell took part in a robbery of the 7-11 Store.

Q. Is that what he said, "Bill, me and Sorrell took part in a robbery"? A. Yes, Sir.

Q. Is that what he said? A. "At the 7-11 Store on Xenia Avenue".

Q. Didn't he tell you that he and Sorrell went in that place, but Sorrell was the only guy who pulled the gun? He never had a gun out? A. Yeah, he said Sorrell was the one that did all the talking and you know, pointed the gun at the clerk.

Q. And asked for the money, took the money? A. Yeah, Sorrell did everything.

Q. The whole bit, right? A. Right.

Q. He said all he did was stand there? Right? A. He said robbed them.

Q. Didn't he say "All I did was stand there"? Didn't have a gun out or anything? A. Well, he did say that he didn't pull a gun on anybody or anything like that.

Q. He just stood there? Right? A. He went into—stood, yeah. **(Page 162)**

Q. And didn't say a word? Right? A. Right.

Q. Now, Mr .Sykes, just prior to this conversation

you had with him, where he told you all these different things about this alleged incident— A. Right.

Q. —you had a conversation with him, didn't you, before he told you all of this? Right?

MR. SLAVENS: Objection, Your Honor. Question too general, "you had a conversation".

Q. I asked him before the statement did he have a conversation with him.

THE COURT: OVERRULE the objection.

Q. What's your answer? A. Yeah, I gave—I guess for a couple seconds I talked to him, yeah.

Q. Yeah, you had a little talk with him and you said "yeah, I need to know this stuff and it's confidential. You know, I wouldn't testify against you in Court or anything like that"? A. I didn't say that, Sir. I didn't say it was confidential.

Q. Could you wait until I finsh my question. I might change it at the end and you might want to change your mind. Okay. A. Um-humm. **(Page 163)**

Q. You never made that statement "I wouldn't testify against you. This is confidential." A. No, Sir.

Q. Aren't most of your conversations with your, you call them clients, confidential in nature?

MR. SLAVENS: Objection, Your Honor.

THE COURT: SUSTAINED.

Q. You did not indicate to this man it was a confidential conversation? A. No, Sir. Now, he might have assumed that it was, but I did not give him any reason to assume that.

MR. SLAVENS: Objection, Your Honor, to what he might have assumed.

THE COURT: We'll OVERRULE the objection.

Q. It is customary for your clients to tell you about their incidents of violating the law?

MR. SLAVENS: Objection, Your Honor.

THE COURT. SUSTAIN.

MR. SCHWARZ: Your Honor if I may, the reason I'm going into this—well, I'll approach it from further direction.

Q. Officer, isn't it fair to say that—yeah, you are a parole officer, isn't it fair to say that the parole officer-parolee relationship and attempt—your attempt is rehabilitation? A. Yes, Sir. **(Page 164)**

Q. Depends primarily upon the confidence that the client has in you?

MR. SLAVENS: Objection, Your Honor.

MR. SCHWARZ: I'll profer this if it's necessary, Your Honor. I think it's necessary to go to the privileged communication that I may be after on appeal. So, I'll need it for the record.

THE COURT: Let's profer it, (*Sic*) Mr. Schwarz. I'm going to SUSTAIN the objection.

MR. SCHWARZ: I'll read the profer (*Sic*) as I see it in the record with this witness here. If what I say is not as you would testify you stop me. Okay? A. Um-humm.

MR. SCHWARZ: Let the record show that for the purposes of this profer, (*Sic*) if this witness were permitted to answer the questions asked of him he would testify that the confidence of the parolee and the parole officer is one of the basis of the success or of the action to be taken in the rehabilitation of the parolee, that this confidential relationship or this existence of this confidence between the two is necessary in order for the parole officer to have full knowledge of the activities of the parolee. Is that a fair statement? A. You're talking about confidence. This isn't anything—I mean the client or the parolee does realize that I do represent authority and because of this aspect of my job, I—you know, the **(Page**

165) normal parolee, I don't see how he can put his full confidence in me because he does know I have the power to arrest him and I do have those duties.

Q. Okay. We'll go back on regular Cross. What arrest powers do you have? A. I have the power to arrest one of my clients if he's in violation of his parole.

Q. What other arrest powers? A. Only the power to arrest a parolee as a client of mine when he's in violation of his parole.

Q. That's the only arrest power? A. Yes, Sir.

Q. And what other authority do you have as far as recommendation of returning to the penal institution or staying on the street or whatever? A. What kind of power do I have, do you say?

Q. What authority do you have? A. What we do is make a—we report the facts or the information, then in a certain aspect of the report we give—what we think should be done to the client. In other words, should he be returned to the institution or should he be returned to the street.

Q. And you are an agent of the penal institutions of the State? Is that correct? **(Page 166)** A. No, I am an agent of the Adult Parole Authority, State of Ohio.

Q. Well, isn't that division a division of the department of corrections?

MR. SLAVENS: Objection to this Your Honor.

THE COURT: Going to OVERRULE the objection. Go ahead, Sir.

A. The Adult Parole Authority is an agency under the department of rehabilitation and correction.

Q. But all of its clients come from the penal institution, isn't that correct? A. Not all my clients.

Q. The Adult Parole Authority? A. The majority of my clients come from penal institutions, yes.

Q. And if they violate the provisions of parole, they are subject to arrest by you and returned to the penal institutions? A. I do not have that sole power. Like I said, all I do is suggest or recommend. The final decision is made out of a central office division.

Q. Prior to getting this statement from Terry Gallagher with regard to this matter, did you advise him of his Constitutional Rights, such as the right to have an attorney present? A. No, Sir. **(Page 167)**

Q. Or did you advise him that he didn't have to make a statement? A. I didn't advise him of his Rights. In other words, I did not tell him that the information he gave me could be used against him at a later date. I did not say that.

Q. You did not tell him the statement he was about to make could and would be used against him in a Court of law if he were charged with this offense? You didn't tell him that? A. No I didn't.

Q. You were aware he was under charge of armed robbery? Is that correct? A. Yes.

Q. Did you tell him he could stop at any time during the interrogation during the statement? A. Well, it was a very—I wouldn't term it "interrogation". It was just an informal talk. I mean I didn't force him to give me me any statements at all.

Q. You did not advise him of any of these Rights, isn't that correct, prior to getting the statement from him?

MR. SLAVENS: Objection, witness was answering the question. I think he was cut short.

THE COURT: The objection is SUSTAINED. Allow the witness to finish. Go ahead, Sir. A. In a formal way I did not say this, but on the other hand, I did not force him with any words of power, persuasion to give me **(Page 168)** anything.

Q. And he was in the jail, wasn't he? A. Yes, Sir.

Q. Under parole—as we call it "parole sticker"? A. He had the Adult Parole Authority detainer on him.

Q. Right. A. In addition to being there for armed robbery.

Q. And he was under $10,000.00 bond? A. Yes.

Q. Did you discuss the possibilities of whether or not he would be—would remain on parole prior to getting this statement from him? A. Could you rephrase the question?

Q. Did you discuss the possibility of his staying on parole or being returned to the institution prior to getting this statement from him? A. I don't believe I did, no.

Q. Did you back at the first interview, back on June the 26th when he told you he didn't want to make any statement about it? A. All I can recall saying is that I stated that I would like information in regard to the circumstances. I didn't say anything about — I didn't make any deals or promises in any manner, no.

Q. Where did the suggestion that you might have made a deal or promise come from? Did I suggest that to you? A. That's what it sounded like to me. **(Page 169)**

Q. Have you discussed Terry's case with Detective Walsh? A. Yes. After I received the—well, in regard to a particular incident I did, yes.

Q. When did you discuss it with him? A. Well, when Terry first got arrested, I—and it is our procedure to get the offense report and report of arrest and I came in contact with Detective Walsh in that regard.

Q. Did he make any statements to you with regard to Terry's case? A. I can't recall what—that was this past summer.

Q. Would your notes reflect that? A. Well, I might have something in here, yes, Sir.

Q. Why don't you look through there. A. There is one thing that we did discuss, was the wig.

Q. Um-humm. A. I mean when I did find the wig.

Q. Anything else? A. Anything else, in regard to Mr. Gallagher?

Q. Um-humm. A. Directly.

Q. To Mr. Gallagher in this incident, this 7-11 incident? A. Right.

Q. Did you discuss anything with regard to Mr. Gallagher in this incident with Detective Walsh? A. Yes. I talked to him, well on June 30th, 1972, I talked to **(Page 170)** Detective Walsh, in regard to the complaint of Alex E. Dean.

Q. What about?

MR. SLAVENS: Objection, to what Detective Walsh may have said.

MR. SCHWARZ: He's right here, Judge.

THE COURT: I'll OVERRULE it, allow this.

MR. SCHWARZ: Thank you, Sir.

Q. Go head. A. At this time—well, he informed that—

Q. Perhaps I can clarify this and save us all a little time here. Did Detective Walsh ever make any statements to you with regard to well, if you get a statement or know anything about it would you contact us? A. No, not at all.

Q. Never did? A. No, Sir.

Q. You approached him, right? A. Well, I always approach the Dayton Police Department, detective section.

Q. Um-humm. A. In order to get the offense report and report of arrest.

Q. Then when you get—I'm sorry. Go ahead. Were you through? A. Yes, Sir.

Q. And when you go to the jail to get a statement from the **(Page 171)** parolee, parole violator, accused, or whatever, do you take that statement with the intention of giving it to the police if it indicates some guilt? A. It is not our policy.

Q. It is not your policy? A. We don't do this. We don't give copies of our reports to the police departments.

Q. Well, did you make the statement that you have—did you make that known to Detective Walsh or to the Prosecutor in this case, or did they solicit that from you? A. What information—you mean the fact I'm here today?

Q. The statement you got from Terry, did you go to them and say "I have this statement", or did they call you and ask you if you had a statement? A. Well, I got subpoenaed into Court. That's the reason why I'm here, and I did not go to them and tell them that I have the statement from Terry Gallagher, no. They came to me.

Q. Have you ever discussed this statement with them prior to today? A. You mean the statement in regard to the details that I have mentioned?

Q. The statement that you say Terry Gallagher gave to you over in the City Jail, have you ever discussed that with anyone until today? A. Not actually, no, Sir. **(Page 172)**

Q. Have you talked to Detective Walsh about— A. In reference to the wig.

Q. Anything else? A. But, well, I did not you know give him details in regard to what I'm doing now.

Q. Well, did they call and say "did he give you a statement"? A. I don't remember them saying that, no, Sir.

Q. You just all of a sudden got a subpoena to come over here? A. Yes, I did.

Q. And had never discussed it with the Prosecutor or Detective Walsh? A. I never discussed it with the Prosecutor before.

Q. How about Detective Walsh? A. The only contact I had with Detective Walsh was getting the original offense report and report of arrest and to give him the wig. I mean, you know, I don't—I don't make it—the reason why I'm here, I was subpoenaed in. We don't volunteer. You know, this isn't a regular procedure that we have. I was subpoenaed into Court and I'm here.

MR. SCHWARZ: That's all for this witness.

THE COURT: One moment, Mr. Sykes. Mr. Slavens, Redirect?

MR. SLAVENS: There is one matter I wonder if Mr. Schwarz and I could approach the bench on.

(THEREUPON, Mr. Schwarz and Mr. Slavens approached the bench and no record was made.) **(Page 173)**

THE COURT: Mr. Slavens, any further questions?

MR. SLAVENS: If it please the Court, the State did make a prior objection. After I had considered that and my desire to have the Court aware of all the circumstances of the case, the State would, if the Court would accept it, withdraw that particular objection.

THE COURT: This is the objection to certain aspects of the confidentiality of conversations between parole officer and client.

MR. SLAVENS: Well, I believe it only goes to that one particular question, in reference to—yes, the confidentiality was the matter right before the profer (*Sic*) was made.

THE COURT: All right. Let the record show and we will tidy up the record in this way, the Prosecutor withdraws his objection to the question directly before the profer (*Sic*) and we will allow the questions profered into evidence as if they were asked and answered without objection. Anything further?

MR. SLAVENS: Nothing further, Your Honor.

THE COURT: Sir, you may step down. Thank you. I hate to keep running you gentlemen up and down like a yo-you, I would like to see you for a moment.

(THEREUPON, Mr. Schwarz and Mr. Slavens approached the bench. No record was made.)

THE COURT: Mr. Schwarz, you have a statement **(Page 174)** for the record.

MR. SCHWARZ: Yes, Sir. At this time, the defense moves to strike the entire testimony of the last witness, parole officer, Bill Sykes, with regard to any statements made by this defendant to Mr. Sykes on the dates he testified. The objection is made on the following ground: Prior to this time, the Court may wish to search the record. There has been no positive identification of this defendant at the scene of the robbery. The Court will recall and I didn't raise it at that particular time, because I just wanted to see if it would come out later on, and it did not. The only person who allegedly positively identified this defendant at the scene of this alleged robbery was the witness Alex Dean. The only testimony by Mr. Dean that this was the person—the defendant was the person that was there as he pointed over in the direction of this corner and he said the "gentleman in the blue shirt". The two people sitting in this corner at this time with blue shirts on were myself and the defendant. Now, which of the two he referred to was never cleared up for the record. The question was never asked, nor stated, let the record show that he indicated the defendant. That's the only positive identification of this person at the scene and that's the only thing that could fulfill the element—the one element going to the entire corpus delicti that would tie this **(Page 175)** defendant with the crime. Prior to that time, according to case of State of Ohio vs. Miranda, rather, Arizonia, (*Sic*)

no statements or admissions of the defendant are admissible. For that reason, the statements made to the parole officer should not be admitted against this defendant and his testimony should be stricken. Thank you.

THE COURT: Mr. Slavens, any comment before the Court rules.

MR. SLAVENS: Just briefly, Your Honor, that the defendant has been identified by the witness Alex Dean and would state correctly so.

THE COURT: Mr. Schwarz, the Court cannot recall whether or not the magic words, "the record will show the witness has identified the defendant" were actually used. However, as we recall from yesterday, there were, indeed, two people seated at counsel table in a blue shirt, yourself and the defendant. The defendant was wearing just a blue shirt, only a blue shirt. You were wearing a blue shirt, jacket and tie. We feel that the description, seated over there in a blue shirt, is sufficient to identify the defendant and the clothing he wore yesterday. We feel that if, in fact, the witness had intended to identify yourself, he would have added other articles of clothing you were wearing that were visible. With that in mind, we do feel there has been a sufficient identification of the defendant. We would OVERRULE your motion.

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(Mr. Schwarz arguing oral motion to dismiss after the State rested.) **(Page 194)**

. . . We'd speak now to the statement admitted over objection, of the parole officer. This man was in custody. I'm raising this more for the record than any other purpose at this point. In this custody, was deprived of any freedom. He's under the gun of the parole authorities. The parole officer came to talk to him once. He said he didn't wish to say anything. He came and talked to him again and elicited a statement of the facts surrounding his

arrest and that was his testimony. Now, whether that statement is suppose to (*Sic*) be an admission, whether that statement is suppose to (*Sic*) be, this is what the police say I've done. This is what evidence they have. This is why I'm under arrest. We don't know. It was never clarified. Never submitted as a confession or an admission against interest.

THE COURT: Mr. Schwarz, let me interrupt and ask you this. **(Page 195)**

MR. SCHWARZ: Yes, Sir.

THE COURT: You very ably argued this point last week. Have you found any law to support this position, or cases from other states holding a parole officer is not a law enforcement officer within the meaning of the Miranda decision so as to require the giving of the warnings?

MR. SCHWARZ: Yes, Sir.

THE COURT: Have you found anything in Ohio one way or the other?

MR. SCHWARZ: No, Sir, to my knowledge, there are no Ohio cases specifically on this point. I'm not arguing at this point Miranda only, Your Honor. I'm arguing—

THE COURT: Voluntariness.

MR. SCHWARZ: Voluntariness. I'm arguing Escobedo (*Sic*) as distinguished from Miranda. I'm arguing the Palpo case, the totality of the circumstance case, at least thirty years old and ask the Court to determine if it is within the principles of justice and fair play to take this person, who is deprived of any liberty and for all we know has had no counseling (*Sic*) from an attorney and to permit the parole officer to go in, under the color of his office and I think, none of us are naive enough to think he doesn't have the authority to do things and in fact put the fear of God in a parolee. **(Page 196)**

THE COURT: Do you feel Escobedo (*Sic*) applies only to police officers or a broader category of persons?

MR. SCHWARZ: Applies to anyone who acts under the authority of the State.

THE COURT: Again, any authority for this?

MR. SCHWARZ: There's no authority in Ohio, Your Honor. I haven't researched Escobedo (*Sic*) all the way out. No authority in Ohio as to parole officers. May make new law in this case.

THE COURT: In researching Escobedo, (*Sic*) of course, I'm interested in the scope of it; you need not zero in on parole officers. I'm wondering if it applies to any class of persons other than police officers. Have you an answer on that?

MR. SCHWARZ: No, Sir, I have not.

* * * * * * * * * *

(Page 200)

MR. SLAVENS: Well, using the term, the totality of the circumstances, we feel that from all the facts in evidence that that statement is—was voluntarily given, especially when you consider the fact the parole officer was there once and didn't force the defendant or didn't have the defendant say anything. He arrives again and the defendant starts talking and they have—I believe the parole officer stated, I think it is in the record, they talked for a considerable length of time about other matters and this is just one of the matters they talked about. And, with the fact that the parole officer, as a matter of routine, contacts the arrested parolee, in jail, and is not directed there by any law enforcement agency, it indicates the voluntariness of it, Your Honor. I don't know whether I have answered your question.

THE COURT: Yes, you have. Mr. Schwarz?

MR. SCHWARZ: I would reply only briefly to the

voluntariness again, Your Honor, and as Mr. Slavens points out, the man did go there the first time and the defendant indicated he did not wish to talk about it. At that point, I think it was the duty of the parole officer to let the thing drop. Even though those two cases that have been mentioned, two cases, the Miranda and the Escobedo (*Sic*) case, may not, as to case holdings in other jurisdictions, apply to parole officers, this man indicated that he didn't wish to make a statement. The parole officer then returned **(Page 201)** some four or five days later and again asked him or interrogates him about the same circumstances. This man is on parole at this time, and I'm sure the Court is aware of the possibilities if the parolee does not, in fact, cooperate and be cooperative with his parole officer. That man, at that time, is the man between the parolee and the institution only. I think that the Court, in considering the voluntariness of using the totality of the circumstances test, would have to agree that if this person, involves an attorney, too, did have an attorney, would never have answered any questions or made any statements. It's a total overscheming of the inferred confidential relationship that's really a necessity to the parole officer-parolee relationship. It has to be there. Without that, there wouldn't be an effective parole. No one will say anything to anyone. There's not an effective communication.

THE COURT: Coming on to rule on the motion of the defendant, we are sitting here without a jury. The Court is going to OVERRULE the motion at this time. We feel there's been a sufficient showing of each and every element to warrant the case going forward at this time. We do intend to do some more research on the point you raised last week and have raised again today, however. We'll do this at the conclusion of the case. Mr. Schwarz?

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(Page 202)

Terry L. Gallagher,

being duly sworn according to law, took the witness stand and testified as follows:

Direct Examination

By Mr. Schwarz:

Q. State your name for the Court, Terry. A. Terry Francis Gallagher.

Q. You're the defendant in this case? A. Yes, Sir.

Q. Terry, you've heard the testimony concerning the 27th of May, 1972, an alleged robbery at the 7-11 Store on Xenia Avenue. I'll ask you if you were, in fact, in that store on the 27th of May, 1972? A. No, Sir.

Q. Let me ask you this, Terry. Have you ever, prior to your incarceration in the jail over here on June the 12th, 1972, have you ever worn a mustache? **(Page 203)** A. No, Sir.

Q. Never have? A. No, Sir.

Q. How'd you happen to grow that? A. Because some gentleman in the county jail told me it would make my face look thinner if I wore a mustache. That's the reason I grew a mustache.

Q. Do you own a blond-colored wig? A. No, Sir.

Q. Now, after you were arrested you were taken where? To the City Jail, City of Dayton? A. No, Sir.

Q. Where were you taken? A. County Jail.

Q. Were you eventually taken to the City Jail? A. Yes, Sir.

Q. And you were arraigned over there? Is that correct? A. In the City Jail?

Q. In the City Jail. A. Yes, Sir.

Q. In the Dayton Municipal Court? A. Yes, Sir.

Q. Did you at that time have the funds to hire an attorney? A. No, Sir. **(Page 204)**

Q. Did you request that an attorney be appointed for you? A. Yes, Sir.

Q. At what point in time did you do that? A. When they had my arraignment.

Q. Do you recall approximately what date that was? A. No, I don't recall the exact date.

Q. How many days was it after you were arrested? A. Six or seven days.

Q. And you were arrested June 11th or 12th? A. June 21st.

Q. June 21st. And when was the first time you saw an attorney after you requested one be appointed for you on arraignment? A. On July 3rd.

Q. July the 3rd? A. Yes, Sir.

Q. You've heard the testimony of your parole officer Sykes. Can you tell the Court about that please? A. Well, he came to the City Jail. I don't remember the exact day. It was a few days after I was arrested, and he asked me if I had anything to state at the time. And I told him I had nothing to say. And he returned, I think it was July 2nd or 3rd, and he asked me if I would give him the evidence surrounding my arrest. **(Page 205)**

Q. Now, had you been afforded an opportunity to talk to an attorney at that time? A. No, Sir.

Q. Go ahead. A. And I told him the evidence that was given to me about my arrest.

Q. Given to you by whom? A. By the detective, arresting officer.

Q. Who was that? A. Detective Walsh and Lou Wright.

Q. What did you relate to Mr. Sykes? A. I told him that the police believe me and Richard Sorrell went to the 7-11 Foodstore on Xenia Avenue in a 1961 Ford I believe it was, with intent to rob.

Q. Have you had any conversation with Sykes since then? A. Yes, Sir.

Q. When was the last time? A. Approximately two hours ago.

Q. What did he relate to you about the testimony he gave the other day at that time?

MR. SLAVENS: Objections, Your Honor.

THE COURT: OVERRULED.

A. He told me that he knew that I wasn't giving a confession, that I was just giving him the confession surrounding my arrest.

(Page 206)

MR. SCHWARZ: Cross.

THE COURT: Mr. Slavens on Cross.

Cross Examination

By Mr. Slavens:

Q. You indicated that you grew the mustache since you've been in jail to make your face what? Look thinner? A. Yes, Sir.

Q. Why were you concerned about your face looking heavy or puffier? A. Yes, Sir.

Q. Do you own a wig? A. Yes, Sir.

Q. What kind do you own? A. It's sitting right there in that sack.

Q. Let me hand you what's been marked State's Exhibit 3 for identification purposes. A. Yes, that's my wig.

Q. And you were arrested you stated on June 21st, 1972? A. Yes, Sir.

Q. And do you recall the name of the police officer who arrested you? A. No, Sir. It was a deputy sheriff.

Q. Do you know the deputy sheriff's name who arrested you? A. No, Sir. **(Page 207)**

Q. Do you recall if he was in uniform? A. He was in a deputy sheriff's uniform.

Q. Yeah. Was not dressed in civilian clothes? A. No, Sir.

Q. I believe you stated you spoke to Mr. Sykes a couple hours ago. A. Yes, Sir.

Q. And your testimony is that you told him what the police had told you when you were arrested? A. He asked me for the evidence surrounding my arrest and I told him what the police had told me.

Q. Right. In other words, when Mr. Sykes interviewed you the second time? A. That was for the second time.

Q. Well, when was the second time? A. July the 2nd or July 3rd I believe. I'm not quite sure.

Q. One time you were in jail, he came and visited you, you wished not to say anything. He left. A. Yes, Sir.

Q. And the next time he came, you did talk with him? A. Yes, Sir.

Q. And you weren't forced to talk to him? A. No, Sir.

Q. You didn't have to talk to him? You knew that? Right? A. Yes, Sir. **(Page 208)**

Q. And what you said to him was voluntarily given by yourself? A. Yes, Sir.

Q. You don't deny that? A. No, Sir.

Q. So that was the second time you talked to Mr. Sykes? A. Yes, Sir.

Q. And your testimony is that what you told him on the second interview was what the police had told you? A. Yes, Sir.

Q. And then you talked to Mr. Sykes once since the

last time Mr. Sykes testified, a couple hours ago? A. I've talked to him numerous times since I've seen him.

Q. Have you? A. But I seen him just a few hours ago.

Q. And when did the police tell you that they found your wig at 144 Valley Street? A. They didn't. The parole officer told me that.

Q. How'd he know that? A. Because—

MR. SCHWARZ: Object to how he knew whatever he knew, Judge.

THE COURT: We would SUSTAIN the objection.

Q. Did the police know you were living at 144 Valley Street? **(Page 209)**

MR. SCHWARZ: Object to what the police know.

Q. Did the police tell you you were living at 144 Valley Street?

THE COURT: We're going to SUSTAIN the objection for the record. You may repeat this last question, Sir. That has not been objected to.

MR. SLAVENS: Yes, Sir.

Q. Did the police tell you you lived at 144 Valley Street? A. No, Sir.

Q. Did the police tell you you lived with a girl by the name of Linda Smith? A. No, Sir.

Q. Did the police tell you you borrowed a car from Clark Evans? A. Yes, Sir.

Q. Did they tell you that you had a .22 caliber black and brown handled pistol? A. No, Sir, not that description.

Q. Did he tell you that Morgan Sorrell or Dick Sorrell had a .25 automatic pistol? A. I don't recall the gun they told me. They told me he had an automatic pistol.

Q. And you heard Mr. Sykes testify that you told him about the wig at 144 Valley Street and that you lived with Linda Smith? A. No, Sir. **(Page 210)**

Q. You didn't hear him say that? A. No, Sir. He didn't refer to nothing about the wig, except for he got it from there.

Q. Prior to your talking to Mr. Sykes the second time when you talked with him, have you been advised of any Rights that you had? A. Yes, Sir.

Q. Do you recall when that was? A. It was on the morning Detective Walsh and Detective Lou Wright took me upstairs to the interrogation room.

Q. Did you understand those Rights? A. Yes, Sir.

Q. Do you recall whether or not you executed any particular form? A. No, Sir. Just a Rights form I signed if that's what you're referring to.

Q. Yes. You signed what's known as a pre-interview form? A. Yes, Sir.

Q. I'd like to hand you an item that's marked State's Exhibit 2 for identification purposes and ask you if you recognize that? A. Yes, Sir.

Q. Was that the form you were referring to that you executed the morning after your arrest? A. I guess it has to be the same one. My name's on the bottom.

Q. You don't deny that's your name? A. No. That's my name. **(Page 211)**

Q. And you did sign one? A. Yes, Sir.

Q. Do you recall whether or not on that day that you executed that particular form you saw Mr. Sorrell? A. Yes, Sir.

Q. And where was he? A. He brought with me to the detective's office, same time I was.

Q. And at that time did Mr. Sorrell make any statements to you? A. Referring to what?

Q. Well, let me rephrase the question. You spoke with Mr. Sorrell that day in front of the detectives? Is that correct? A. He was in the room.

Q. Did he speak to you? A. Yes.

Q. Say "hi" or anything? A. Yes, Sir.

Q. Do you recall whether or not during that conversation with Mr. Sorrell he made any statements to you in reference to the armed robbery at 7-11 Store?

MR. SCHWARZ: Object, relevance.

THE COURT: Read the question if you would.

(THEREUPON, the last question was read by the court reporter.) **(Page 212)**

THE COURT: Mr. Slavens, relevancy?

MR. SLAVENS: Yes, Your Honor. We feel that on direct examination this defendant denied that he was in that store at that particular time, and we have a right to go into what was said to the defendant by Mr. Sorrell on this particular date.

MR. SCHWARZ: Your Honor, I feel that has no relevance whatever, even if Mr. Sorrell would have pointed his finger and said "this guy was with me". It wouldn't be relevant. That's what someone else said. That's hearsay.

MR. SLAVENS: But, it's —

THE COURT: I'm going to SUSTAIN the objection.

Q. On the date that this form was executed, did you make any statements to the police department officials, either the Dayton Police Department or the Montgomery County Sheriff's Officials in reference to your involvement, if any, in the armed robbery at the 7-11 Store? A. No, Sir.

Q. You did not tell them that you were driving a particular type of automobile and that you went to that 7-11 Store? A. No.

MR. SCHWARZ: Object to any statements allegedly made on that particular date to the police department. It's already been suppressed.

THE COURT: SUSTAINED. **(Page 213)**

Q. Where were you living when you were arrested? A. I was living at 2104 Salem Avenue, but I was also staying with a gentleman on Valley Street.

Q. Do you know that address? Is that 144? A. 144 Valley Street.

Q. And what was that person's name? A. Clark Evans.

Q. What kind of car does he have? A. '61 blue Ford station wagon.

Q. Have you ever driven that car?

MR. SCHWARZ: Object, relevance.

THE COURT: Relevancy, Mr. Slavens?

MR. SLAVENS: I will withdraw that question and rephrase it, Your Honor.

THE COURT: Be no ruling then on the objection.

Q. Do you recall whether or not you were driving that car May 27th, 1972? A. Well, you asked me was I driving that car that day?

Q. Yes. A. No, Sir, I wasn't.

Q. On the date of May 27th, 1972, did you ever associate with, have company with an individual by the name of Mr. Sorrell? A. No, Sir. **(Page 214)**

Q. What did you do that day? A. I don't really recall exactly what I did that day. I was arrested a month after that robbery took place.

Q. But you know for a fact that you were not in the 7-11 Store? A. On that particular day, yes.

Q. Well, than what did you do on that day? A. I really don't recall.

MR. SCHWARTZ: Object, rel — repetitive, Your Honor, having just been answered.

THE COURT: We're going to SUSTAIN the objection.

Q. But you know that on that day you were not in a blue Ford owned by Mr. Clark Evans and you know

that you were not with Mr. Sorrell, you know that you were not at the 7-11 Store, but yet you do not know what else you did?

MR. SCHWARZ: That's argumentative.

THE COURT: We are going to SUSTAIN the objection to the manner in which the question is phrased.

Q. Do you recall what you did on May 26th, 1972? A. No, Sir.

Q. Do you recall whether or not you saw Mr. Sorrell on May 28th, 1972, which would have been a Sunday? A. No, I don't recall. I knew what I was doing the next day.

Q. What were you doing? **(Page 215)** A. I went to Indian Lake with mother and father.

Q. Okay. A. On a Monday, it was some holiday.

Q. Do you know where that 7-11 Store on Xenia Avenue is? A. Not for sure. I'm not sure where it's at.

Q. You indicated that Mr. Sykes in your interviews with Mr. Sykes, he testified about, you indicated to him the facts of your arrest? A. Yes, Sir.

Q. And he asked you questions about — did he ask you questions about the 7-11 Store incident? A. Yes, Sir and numerous other things.

Q. And were those other things related to your arrest? A. No, Sir.

Q. But when you were interviewed, did Mr. Sykes ask you what you did on May 27th, 1972? A. No, Sir.

Q. Do you recall giving Mr. Sykes information about other dates on his second interview with you? A. He questioned me about other things that happened within the City of Dayton, yes.

Q. And dates were mentioned? A. Yes, but I don't remember the dates.

Q. But at that time you knew the incidents that he

was referring **(Page 216)** to? A. Not particularly.

Q. Well, didn't you hear Mr. Sykes testify that you admitted this crime to him? A. I remember you asked him a question and he said he was given the facts—he'd asked me the evidence surrounding my arrest, if you'll look at the thing there.

Q. So your answer to my question is what? Yes or no? A. Yes.

Q. And one further question, Mr. Gallagher, have you ever been arrested and convicted for a State or Federal offense?

MR. SCHWARZ: Object.

THE COURT: Basis?

MR. SCHWARZ: One is the—I don't have a citation right off hand, but it's a U. S. District Court ruling that says that's not a proper question. It's not a State court ruling, it's U. S. District Court. It's the same one that touches or involves also the question of the—it's the case that has to do with the dead time ruling in the jail while awaiting trial. I believe that same issue is in that case if I'm not mistaken.

THE COURT: Read the question back.

(THEREUPON, the last question was read by the court reporter.)

THE COURT: In the sense the two phrases are used with the conjunctive "and", we're going to OVERRULE the **(Page 217)** objection. The question may be answered. A. Yes, Sir.

Q. Explain what and when.

MR. SCHWARZ: Object. Question is have you ever been arrested and convicted. Goes to credibility I believe only for the purposes of credibility only and once the question is asked and answered, I don't think

the going into the details or facts of the other cases is admissible, Your Honor.

THE COURT: Mr. Slavens?

MR. SLAVENS: I believe in order to go into the area of credibility that my last question is one which logically follows and is proper.

THE COURT: I'm going to OVERRULE the objection and allow the question to be answered. We will restrict questions following this, however.

A. What was the question? I don't know the exact date when I was arrested, but I've been arrested numerous times.

THE COURT: The question is not whether you've been arrested. It's whether you've been arrested and convicted. A. Yes, Sir.

Q. And for what offense and when the year was, if you can remember that? **(Page 218)** A. It was in February of 1970, I believe for malicious entry in Miami County.

Q. Yes, Sir. A. I done answered the question.

74-492

Supreme Court, U. S.
FILED
FEB 20 1975
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF OHIO

STATE OF OHIO Petitioner	*	CASE NO. 73-623 (Court of Appeals Case No. 4158 C.A.)
-vs-	*	
TERRY L. GALLAGHER Respondent	*	(Common Pleas Court Case No. 72-CR-826)

BRIEF OF RESPONDENT OPPOSING

WRIT OF CERTIORARI

LEE C. FALKE
Prosecuting Attorney of
Montgomery County, Ohio

By: Randal A. Anderson, Jr.,
Assistant Prosecuting Attorney
and
Cynthia C. Anderson,
Legal Assistant

Montgomery County Courts Bldg.
41 North Perry Street, Suite 308
Dayton, Ohio 45402

ATTORNEY FOR PETITIONER

HARRISON & SCHWARZ
By: Jack T. Schwarz
730 South Main Street
Dayton, Ohio 45402

ATTORNEY FOR
RESPONDENT

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Statement of Facts

On or about May 27, 1972, the Seven/Eleven Store, located at 405 Xenia Avenue, Dayton, Ohio, was the scene of an armed robbery.

According to the testimony of the clerk who was allegedly robbed at that time, there were approximately six persons within the store. Two men standing side by side were within arms length, one with a gun.

According to the testimony of said victim, one of the robbers was a tall man who had the gun, who made all the statements as to taking the money, and who, in fact, did all of the actions alleged to have happened.

The victim then identified the Respondent, hereinafter referred to as such, as the person standing next to the person who conducted the robbery. The victim admitted that Respondent said nothing, did nothing, had no weapon, did not place said victim in fear, and in no way physically or orally participated in any manner in the conduct of the robbery.

Police officers attempted to testify at the trial of this cause, and their testimony, as to any statements taken from Respondent, were suppressed by the Court after a Motion hearing and were held to be inadmissable. Absent the testimony of a parole officer, William Sykes, the State's case is entirely devoid of any evidence which would connect Respondent with the person who allegedly robbed the Seven/Eleven Store.

At the trial of this cause, a parole officer, William Sykes, testified that he had conversations with Respondent while Respondent was incarcerated in the jail of the Dayton Police Department. The first of such conversations was conducted on or about June 26, 1972, prior to the time when Respondent was furnished legal counsel, Respondent being indigent and without funds to hire a lawyer.

At such meeting on June 26, 1972, Respondent indicated to Parole Officer Sykes that he did not wish to discuss the charges against him in connection with this incident.

Parole Office Sykes returned to the Dayton Jail to again discuss with Respondent this alleged crimeon July 3, 1972, again prior to the time that counsel was appointed to represent Respondent.

During the trial of this cause, Parole Office Sykes was permitted to testify as to a conversation had between himself and Respondent with regard to the alleged robbery occurring May 27, 1972, at the Seven/Elcven Store, 405 Xenia Avenue, Dayton, Ohio.

Parole Officer Sykes testified that he at no time advised Respondent of his rights guaranteed or set forth in the case of MIRANDA -v- ARIZONA.

The Court, over objection, permitted Mr. Sykes to testify as to statements made by Respondent at that time, July 3, 1972, with regard to the alleged robbery, of which Respondent had, at that time, been accused and charged, the statements of Parole Officer Sykes being the only evidence tending to or in any way showing that Respondent, in fact, was involved. Parole Officer Sykes was permitted to testify that Respondent at that time stated to him that he went to the food store with the person who robbed such store, and that Respondent stated to him that he had a weapon, that he was prepared to use it, and that he and the other robber acted in concert.

These statements, admitted over the objection of defense counsel, are the only statements which in any way tie Defendant tothe alleged robbery.

Further, it is admitted by the investigating officer that even though identification had been made of the prson or the principal involved in the crime, that said principal was never charged with the offense of armed robbery.

Upon conclusion of the trial, Respondent was found guilty of armed robbery and sentenced to a term of ten to twenty-five years in the Ohio Penitentiary.

An appeal was duly taken and on May 30, 1973, the Court of Appeals for Montgomery County, Ohio, affirmed the Judgment of conviction. Subsequent appeal was taken by Respondent to the Supreme Court of Ohio and on June 26, 1974, the Supreme Court of Ohio reversed Respondent's conviction.

RESPONSE TO PETITIONER'S REASON FOR GRANTING THE WRIT

I.

Respondent contends that under the Statutory Law of the State of Ohio, the parole officer, acting under color of authority of the Adult Parole Authority, is in effect, a police officer, as invisioned by the intent, if not the exact letter, of the ruling in the case of

MIRANDA -v- ARIZONA, 384, U.S., 436 (1966)

"There is hereby created in the Division of Correction of the Department of Mental Hygiene and Correction at bureau level an 'Adult Parole Authority'....."

SECTION 5149.03 OHIO REVISED CODE, provides as follows:

"The adult Parole Authority shall administer Chapter 5149, and provisions of chapter 2967.00 and Sections 2301.27, 2301.32, inclusive, 2905.28, 2941.46, 2951.05, 2951.06 and 2951.08, of the Revised Code, as imposed duties upon the Authority."

Sections 2941.46, 2951.05, 2951.06 and 2951.08 are statutes empowering persons designated as probation officers, deputy sheriffs, police officers, etc., to make arrests under given circumstances. By granting or imposing upon the Adult Parole Authority the provisions of each of the Sections and by empowering it's parole officers to act under such sections, the Legislature has, in effect, if not in fact, given to the parole officer the authority to make arrests, to incarcerate persons and to, in general, carry out many of the activities carried out by duly authorized, sworn police officers.

Section 5149.05, OHIO REVISED CODE, in fact, gives parole and field

officers of the Adult Parole Authority the authority to carry firearms. Section 5149.23 (a) OHIO REVISED CODE, gives the Adult Parole Authority the authority to deputize agents, which shall have all the powers of police officers in this State.

In addition, parole officers have the authority to arrest persons under their control for <u>suspected</u> violations of the conditions of their parole, to place parole detainers on persons arrested for crimes even before they are, in fact, convicted of such crimes, and to in many ways deprive persons of their freedom.

To say that such persons are not 'police officers' of the State is to, in fact, completely ignore the intent of the decision in <u>MIRANDA -v- ARIZONA</u>, supra. In the instant case, the parole officer admittedly questioned Respondent, or if the Court prefer, discussed the matter with Respondent, while Respondent was incarcerated in the Dayton Jail. (BE 151-159) The parole officer admitted (BE 165) that he had the power to recommend the returning time of parolees to the penal institution from whence they were paroled. The parole officer admitted (BE 151) that on June 26, 1972, when he had attempted to question Respondent with regard to this matter, Respondent stated that he did not wish to make a statement with regard to the circumstances surrounding his arrest for this alleged crime.

The parole officer testified (BE 166-167) that he did not, in any manner, advise Respondent of his Constitutional rights, his right to counsel, his right to remain silent, that anything he said could and would be used against him in Court.

Further, the Court's attention is directed to the case of <u>MATHIS -v- UNITED STATES</u>, 391 U.S., 1

In that case, a Petitioner was convicted in the United States District Court on two counts of 'Knowingly filing false claims' in connection with his tax returns. The Petitioner was incarcerated in a state penal institution on a state charge. During such incarceration, an investigator from the Internal Revenue Service questioned the Petitioner on numerous occasions, eliciting statements and documents which were substantially and subsequently presented in the prosecution of the petitioner under the federal charges.

The tax investigator admittedly did not advise the Petitioner of his Constitutional Rights under the <u>MIRANDA -v- ARIZONA</u>, decision. In considering whether or not the tax investigator was required to so advise the prisoner, the Court held that (Pg 4)

"It is true that a routine tax investigation may be initiated for the purpose of a civil action rather than criminal prosecution. To this extent, tax investigations differ from investigations of murder, robbery and other crimes. But tax investigations frequently lead to criminal prosecutions just as the one here did.....and, as the investigating Revenue agent was compelled to admit, there was always the <u>possibility</u> during his investigation that his work would end up in criminal prosecution. We reject the contention that tax investigations are immune from the Miranda requirements for warnings to be given to a person in custody".....(emphasis added)

"The government also seeks to narrow the scope of the Miranda holding by making it applicable to only questioning of one who is in custody in connection with the very case under investigation. There is no substance to such a distinction, and, in effect, it goes against

the whole purpose of the Miranda decision, which was designated to give meaningful protection to Fifth Admendment Rights." .....

.....(emphasis added)

As is stated in MIRANDA -v- ARIZONA, 384 U.S. at page 478:

"To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized."

It is Respondent's contention that the parole officer, William Sykes, had a duty to inform Respondent of his rights to an attorney, to remain silent and most important, that any statement he made could and would be used against him in any trial of this cause.

In comparing the instant case with the case of

MATHIS -v- U.S.,

the Court may state or may feel that tax investigations are entirely different than investigations conducted concerning a robbery. However, the important language in that case is that investigations frequently lead to criminal prosecution, just as the one here did, and is even more important to the instant case.

In the instant case, Respondent was not only a suspect in the crime which was the cause of this trial, but was, in fact, charged with the offense of armed robbery at the time he was questioned by Mr. Sykes.

It is undisputed in the record that the parole officer, William Sykes, knew that Respondent, was in fact, charged with armed robbery; and that he must have known that his testimony could have been used at trial. For this reason, alone, the parole officer should have advised the Respondent of his

Constitutional Rights.

The cases relied upon by the Court of Appeals for Montgomery County, Ohio, in dismissing appellant's appeal are summarized as follows:

PEOPLE -v- RONALD, W., 24 N.Y. 2nd, 732, 302

N.Y.S. 2nd, 260, 262 (1962)

This case is clearly inapplicable to the instant case, inasmuch as, it involves a probation revocation proceeding and does not, therefore, involve the admissability of statements of a probation officer in a trial of a probationer or parolee in a subsequent criminal proceeding.

In the RONALD, W. case the Defendant or Appellant, Ronald W. had been previously convicted of a crime and placed on probation. He, subsequently, in an interview or discussion with his probation officer was noticed to have needle markes on his arm.

In a discussion with his probation officer regarding said needle markes, the probationer admitted that he had been using heroin which was a violation of the conditions of his probation.

The statements and admissions made to the probation officer were admitted in a subsequent probation revocation hearing wherein it was alleged that the probationer had violated the terms of his probation.

It should be noted that an express requirement of the probationer's probation in that case was that he answer all reasonable inquiries of this probation officer.

It should further be noted that the probationer was not, in fact, in custody at the time of the interrogation and, therefore, the provisions of MIRANDA -v- ARIZONA would not apply.

That case has no applicability to the case at hand.

GILMORE -v- PEOPLE (Colorado), 171 Colo. 358, 457 P. 2nd, 828 (1970)

In this case, the Defendant-Appellant or as they are referred to in Colorado the Plaintiff-in-error was convicted of simple assault and of unnatural carnal copulation.

A part of the evidence presented against him was a statement or statements made to his federal probation officer.

Subsequent to his arrest, Gilmore denied any connection with the crime with which heuas to be charged; however, he requested that his federal parole officer be called to the police station for a conversation.

At the police station, the Defendant made these statements which is not confessions, were in the nature of admissions against interest to his parole officer.

These statements were not elicited by parole officer, Fuller, nor did Fuller attempt to interrogate the Defendant about the crime with which he was charged.

As is quite obvious, the Gilmore case is distinguishable from the case at hand, inasmuch as the parole officer in that case was summoned to the police station by the Defendant who was at that time in custody. It should be noted that the Parole Officer was in no way attempting to question the Defendant about the crime with which he was charged. Such is not the case at hand. It is obvious from the testimony from the record, as indicated, that, in the instant case parole officer Sykes went to the jail, wherein, Respondent was incarcerated and on two occasions, not at the request of Respondent, but of his own volition. On June 26, Respondent refused to answer any questions concerning the offense with which he was charged. On July 3, he made statements to the parole officer with regard to the offense charged only upon questioning by parole officer Sykes. Clearly the statements made to the parole officer in the

Gilmore case were not made in response to an interrogation as in the case at hand; and clearly, the Respondent herein did not summon or request the presence of parole officer Sykes as did Gilmore in the case of GILMORE -v- PEOPLE.

For these reasons, the case of GILMORE -v- PEOPLE herein cited, has no relevance and no applicability to the instant case.

NETTLES -v- STATE, (Florida) 248, 2nd, 259 (Florida District Court of Appeals, 1971)

The Nettles case cites the case of PEOPLE -v- RONALD W., supra and follows the theory of the case that a person who takes advantage of the parole opportunity waives his right to constitutional Miranda warnings when he accepts probation and states further that this waiver continues in effect even on a new and fresh crime as regards his probation officer.

This proposition has no validity taken in the context of the constitutional guarantees made to every citizen of the United States as is well pointed out by Judge Mann in his dissenting opinion in that case.

Judge Mann's dissenting opinion states, in part:

"Such a proceeding is indiepended of the probation revocation proceeding unless the majority imply acceptance of probation carries with it an implied waiver of constitutional rights while probation continues. It is doubtful that even an expressed waiver of constitutional right in future cases could be held but we need not contemplate that. I think it's clear that there is not a waiver of the Fifth Amendment by implication see SPEVACK -v- KLEIN, 1967, 385, U.S., 511, 87 Supreme Court, 616, 17 Lawyers Edition September 5, 1974; GARRITY -v- NEW JERSEY, 1967, 385 U.S., 493, 87 Supreme Court, 625, 17 Lawyers Edition Second 562."

It would appear that the Nettles' case and the case of NEW YORK -v- RONALD W., base their opinions upon the fact or the assumption in view of the case cited in Judge Mann's dissenting opinion.

STATE -v- JOHNSON, (South Dakota), 202 N.W. 2nd, 132 (1972)

Defendant was charged with and found 'guilty' of the crimeof 'obtaining money and property under false pretenses.' According to the facts of the case, the Defendant was on probation for a previous violation and issued a check on a bank where he had no account. His probation officer testified that he went to Defendant's home to question him about the check issued; and that the two conferred in the yard outside Defendant's home, during which time Defendant admitted issuing the check but claimed it had been paid off.

Defendant contended that he had been subjected to custodial police interrogation and was entitled to a warning of his rights as required by Miranda. In overruling and/or dismissing Defendant's appeal the Court said:

> "Miranda warnings do not have to be given on all interrogations. They must be given prior to questioning initiated by law enforcement officers after the person has been taken into custody or otherwise deprivcd of his freedom of action in any significant way. Neither of these compelling factors is present here." .....(emphasis added)

The Court goes on to states that the probation officer does not have a peace officer's broad power of arrest.

The Johnson case is obviously, as the other cases cited by the Court, not applicable and is distinguishable from the present case. Apparently, the parole officers in this state have more broad arrest powers than the parole officers in the state of South Dakota. However, that is not the main distinguishing character of that case.

It is obvious from the statement that the two conferred in the yard outside the Defendant's home, that the Defendant was not in custody and merely had a conversation with his probation officer outside his home and not in the custody or in the custodial atmosphere of the police station.

In the instant case as previously mentioned, this Respondent was in fact, in custody and was questioned on not one, but on two occasions by his parole officer after said parole officer had been advised that the Defendant had no desire to discuss the case. The cases binding as inadmissable statements made to parole officers without giving the person in custody the advice that he has a right to a lawyer and to remain silent are as follows:

PEOPLE -v- GASTELUM, (Calif) 237 Cal., App. 2nd 205, 46 Cal. R. 743 (1965.

The Gastelum case was decided by the District Court of Appeals Fifth District of California, September 23, 1965, prior to the United States Supreme Court holding in MIRANDA -v- ARIZONA.

In that case, after discovering that his parolee had been using drugs prohibited by the terms of his parole, the parole officer accompanied by police officers went to the parolee's residence and found drugs. Subsequent to such findings, and while in custody, the parolee made confessions or admissions to his parole officer which had been admitted in his trial and which resulted in conviction. The California Court of Appeals stated that:

> "The only nominal question is whether, by anology to the rule on search and seizure, Defendant's status as a parolee negated his Constitutional Rights to be advised of his right to counsel or to remain silent. The Supreme Court, in PEOPLE -v- DERATO, supra affirmed the right of a felon in carcerated in the state prison

to be effectively informed of his right to counsel and of his absolute right to remain silent under the Fifth and Sixth Amendments. Certainly a parolee in constructive custody is no less entitled to these constitutional rights than is a felon in actual custody. Therefore we conclude that the rule of DERATO is applicable to a parolee and that it was a reversible error to admit Defendant's confession in evidence."

Further at page 746:

"The Supreme Court of California, following principles enunciated by the United States Supreme Court, has held that the introduction of an involuntary confession elicited in violation of Defendant's rights under the Fifth Amendment to the United States Constitution constitutes a reversible error, per se."

STATE -v- LEKAS, (Kansas) 201 Kan. 579, 442 P. 2d 11 (1968)

In the Lekas case Defendant was taken from his home by a parole officer and a police officer, being suspected of having a weapon in his possession and further being suspected of preparing to leave town. Based upon these suspicions he was, in fact, removed and taken to the police station where his parole officer alone questioned him regarding the possession of said weapon. The Defendant admitted the possession of the weapon to the parole officer and his admissions and subsequent evidence derived from said admission was introduced against him.

The Defendant was convicted and based his appeal upon the grounds that the parole officer did not advise him of his rights set forth in the Miranda decision. The Supreme Court of Kansas stated at page 15:

"It should be emphasized that the issue here presented is not whether the Appellant's parole can be revoked after the Appellant

confesses to the parole officer concerning a new crime, without first having been informed of his Constitutional Rights. Here the incriminating statements admitted into evidence were used to convict the Appellant for a new offense."

This is the issue confronting the Court.

The Kansas Statute sets forth the powers and authority of the Kansas State Board of Probation and Parole:

"And all persons employed under the provisions of this act as probation or parole officers shall have and exercise police powers to the same extent as other peace officers and such powers may be exercised by them anywhere within this state."

The Kansas Court further states that on page 15:

"As we construe the Miranda Decision, if the incriminating statements elicited from the Appellant while in the custody of the parole officer upon interrogation were to be used for the prosecution of a new offense, the parole officer was required to give the Miranda Warning."

The Kansas Court then goes on to cite the case of MATHIS -v- UNITED STATES, 391, U.S. 1, 88 Supreme Court 1503, 20 Lawyers Edition Second 381 (May 6, 1968).

The Mathis case, of course, is cited in this Brief although not referred to in the decision rendered by the Court of Appeals for Montgomery County.

It should be further noted that the authority conferred upon the parole officers of the State of Kansas is not that much more broad than those conferred upon parole officers for the State of Ohio. The Kansas Court

further stated at Page 16:

"In a situation of this kind the truth of the incriminating statements is immaterial."

STATE -v- WILLIAMS, (Missouri, 486 S.W. 2nd 468 (Missouri Supreme Court, 1972)

Defendant, parolee, was a resident at a regional treatment center and his parole officer made a warrantless exploratory search of his nap sack found on top of his dresser in a closet in his room and found marijuana. Subsequent, to this finding, the Defendant was taken to the city police station where the parole officer advised him of his Miranda rights, however, the parole officer failed to inform the Defendant that if he could not afford an attorney one would be appointed for him.

The Supreme Court of Missouri held that any statements taken subsequent to the advising of the rights and also subsequent to the failure to advise the Defendant that he could have a court appointed attorney, were inadmissable.

The Supreme Court of Missouri held that the search of the Defendant's belongings while in this semi or quasi custodial situation was not in fact, constitutional. That Court stated, however, at page 473:

"The judgment of conviction, however, must be reversed for error in the admission of evidence of

(1) the testimony of parole officers Perry and Cothman, both of whom testified that following his arrest, and at the city police station under questioning by officer Perry, appellant admitted that he acquired possession of the marijuana, after Officer Perry, having advised appellant of Miranda rights failed to inform him that the court would appoint an attorney for him if he could not afford one;

(2) the testimony of police officers who subsequently took a written confession from appellant, and

(3) the written confession."

That Court further held that:

"Miranda requires officers of the Missouri State Board of Probation and Parole in the investigation of facts involving the possible commission by an indigent parolee of a fresh or new felony to give the parolee all four of the Miranda Warnings, where he has been arrested and taken into actual police custody."

In view of the better reasoned State cases cited above and in view of the U. S. Supreme Court holding in the case of MATHIS -v- U.S., it is clear that a parole officer must give the Miranda warnings prior to interrogation of a person who is in custody of the police and charged with a new and different offense from that for which he is on parole.

These admonitions not having been given to appellant in the instant case, the admissions should be held to be inadmissable.

RESPONSE TO PETITIONER'S REASON FOR GRANTING THE WRIT

II.

Petitioner raises the question as to whether or not Miranda type warnings must be given at the time of each interview once they have been given and the rights effectively waived. It is clear from an entire reading of the transcript of proceedings and from a reading of the decision of the Ohio Supreme Court (appendix 'A' of Petitioner's Brief) that the trial court and the Supreme Court of Ohio decided that due to the police officers having offered to not file additional charges against Respondent in exchange for his confession, that the Respondent did act or operate under promises of leniency and that his statements constituted involuntary statements, which, in effect, says that the Miranda warnings given prior to such statements were not an effective waiver of said rights.

To attempt to interpose the rights waiver that was signed and later held to be not an effective waiver of such rights, is to beg the question.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should not be granted.

RESPECTFULLY SUBMITTED:

HARRISON & SCHWARZ

By _____

Jack T. Schwarz
Attorney for Respondent
730 South Main Street
Dayton, Ohio 45402 (223-8806)

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Petitioner

-vs-

TERRY L. GALLAGHER

Respondent

CASE NO. 73-623

(Court of Appeals, Case No. 4158 CA)

(Common Pleas Court Case No. 72-CR-826)

CERTIFICATION OF SERVICE

This is to certify that a copy of the Brief of Respondent opposing Writ of Certiorari submitted by the Respondent in said cause, Terry L. Gallagher, has been duly served upon opposing counsel, Randal A. Anderson, Jr, Assistant Prosecuting Attorney, Montgomery County Courts Bldg., 41 North Perry Street, Suite 308, Dayton, Ohio 45402.

HARRISON & SCHWARZ

By Jack T. Schwarz

Jack T. Schwarz
Attorney for Respondent

Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

No. 74-492

OCTOBER TERM, 1974

STATE OF OHIO,
Petitioner,

vs.

TERRY L. GALLAGHER,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF FOR THE PETITIONER

LEE C. FALKE,
Prosecuting Attorney of
Montgomery County, Ohio

HEBERT M. JACOBSON,
Chief Trial Counsel

RANDAL A. ANDERSON, JR.,
Assistant Prosecuting Attorney

Montgomery County Courts Bldg.
41 N. Perry Street, Suite 308
Dayton, Ohio 45402

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

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IN THE

Supreme Court of the United States

No. 74-492

OCTOBER TERM, 1974

STATE OF OHIO,

Petitioner,

vs.

TERRY L. GALLAGHER,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported at 38 Ohio St. 2d 291, 67 Ohio Opns. 2d 354. The opinion of the Court of Appeals for Montgomery County, Ohio is reported at 36 Ohio App. 2d 29, 65 Ohio Opns. 2d 17, 301 N.E. 2d 888. Both of these opinions are set forth in the Appendix to the Petition for Writ of Certiorari to The Supreme Court of Ohio which was filed in this Court on October 29, 1974.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3) since a right has been especially set up and claimed under the Constitution of the United States. The judgment of The Supreme Court of Ohio was entered on June 26, 1974. The Court denied a petition for rehearing on July 31, 1974. The petition for a writ of certiorari was timely filed on October 29, 1974, and was granted on March 31, 1975.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provisions which the above entitled Petition involves is as follows:

Constitution of the United States, Amendment V:

> No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

QUESTIONS PRESENTED

I.

Should the prophylactic rules of *Miranda* be extended to a parole officer (who is a Law Enforcement Officer only in the sense that he can arrest a parole violator) when he interviews the Defendant (his parolee) in jail (but not incommunicado and not in a police dominated atmosphere) so as to exclude the parole officer's testimony offered at a later trial as to the Defendant's confession to him if the parole officer did not recite to the Defendant the *Miranda* warnings on the ground that the situation was inherently compulsory and therefore there was a violation of the Fifth Amendment to The United States Constitution, even though there was no reason to believe that the confession was unreliable or that the parole officer did anything oppressive or illegal?

II.

Assuming arguendo that a parole officer (with the aforesaid limited arrest powers) is a Law Enforcement Officer within the purview of *Miranda* and that his interview in jail with his parolee is a psychologically similar situation to that comprehended by *Miranda*, is not a complete recitation to said parolee of the *Miranda* warnings coupled with his full understanding and waiver of same, given to him a short time before said interview by police officers, sufficient compliance with *Miranda* or must said warnings be repeated at each interview so as not to vitiate an otherwise perfectly reliable statement?

STATEMENT OF THE CASE

Respondent (Terry Gallagher) was arrested on June 21, 1972 by officers of the Montgomery County, Ohio, Sheriff's Office in connection with a number of armed robberies which had occurred in that county. (A. 20 and 44). Eventually he was charged by the police of the City of Dayton, Ohio with the armed robbery of a small food store (known as the 7-11) in that city. At his trial which commenced on November 2, 1972 to the Court (Gallagher having waived a jury [R. 2][1]), the following sequence of events seems to have been established.

Gallagher and another man, known as Richard Sorrell,

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[1] R refers to the Reporter's Transcript of that trial in the Common Pleas Court of Montgomery County, Ohio.

robbed the 7-11 store at gunpoint on May 27, 1972. Sorrell, the only one who exhibited a gun, pointed his gun at Alex Dean, the manager of the store, demanded, and obtained some money. Gallagher, saying nothing, stood beside Sorrell, moved to the wall, and then left with him. Together they walked along the front of the store to the parking lot beside it; approximately thirty-five (35) feet.

Mr. Dean identified Gallagher at his trial, saying that he was wearing a blond wig and sunglasses. Two customers corroborated Mr. Dean's description of Gallagher's actions, but only one of them was able to identify him tentatively. (R. 4-98). Before Gallagher was arrested, Mr. Dean had selected photographs of he and Sorrell from a group of photographs presented to him by Detective Walsh of the Dayton Police Department as being those of the robbers. (R. 26-34, 50-53, 178-180). This identification had survived a pre-trial motion for suppression on due process grounds.

On the morning of June 22, 1972, Detective Walsh and Detective Wright of the Montgomery County Sheriff's Office questioned Gallagher and Sorrell separately. Previous to the questioning of Gallagher, Detective Walsh, using a printed form, recited the *Miranda* warnings to Gallagher who signified his understanding and waiver rights delineated thereby by signing the waiver form. (A. 22-25).

Gallagher had been paroled on February 22, 1972 from the Lebanon Correctional Institution (an Ohio limited security prison) and Bill Sykes, an Ohio Parole Officer, was assigned to his case. (A. 51). Since Gallagher was still under the supervision of the Ohio Parole Authorities, Mr. Sykes, on June 26, 1972, went to the Montgomery County Jail to talk to Gallagher and ask Gallagher if he

would tell him why he was there: but Gallagher said he did not want to talk. (A. 51, 52, 53). Then, on July 3, 1972, on a return visit by Mr. Sykes, Gallagher, in an informal conversation and without prompting (A. 64), told Mr. Sykes in full the details concerning the armed robbery of the 7-11 including the facts that he was carrying a gun and wearing a wig and sunglasses. (A. 54-57). As a result of this conversation, Mr. Sykes recovered a wig from the then residence of Gallagher. (A. 58, 59; State's Exhibit 3, A. 59).

No use was made by Mr. Sykes of any of the *Miranda* warnings. (A. 64).

Gallagher testified at the trial on November 8, 1972.[2] (A. 74-84). He denied being in the 7-11 store (A. 74) and denied implicating himself in the robbery to Mr. Sykes by stating that he merely related to Mr. Sykes a version of what the police had accused him of doing. (A. 76, 77). However, Gallagher admitted that the wig Mr. Sykes had recovered belonged to him. (A. 76). On cross-examination, Gallagher admitted that he was not forced to talk to Mr. Sykes, that he waived his *Miranda* rights, and that his statements to Mr. Sykes were voluntarily given. (A. 77, 79).

The Court's verdict on November 14, 1972 was that Gallagher was guilty of Armed Robbery and, on November 30, 1972, he was sentenced to 10 to 25 years in the Ohio State Penitentiary.

Mr. Dean testified to open the trial and then the prosecution offered Detective Wright. (A. 19 ff). At the conclusion of his testimony concerning the rights waiver by Gallagher, the Court conducted a voir dire examination with respect to voluntariness and to compliance with the

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[2] This case was tried in segments on November 2nd, 3rd, 8th, and 14th, 1972.

Miranda decision. (A. 19-48).

After hearing from Detectives Wright and Walsh, the Court then rejected any testimony of theirs which might be offered as to any admissions of Gallagher's guilt on the sole ground that, if any were made, they were involuntary. (A. 50). No mention was made by the Court, or by anyone else for that matter, of any irregularity in the procedure whereby Gallagher was apprised of and waived his 5th and 6th Amendment rights to silence and to a lawyer. (A. 48-50).

When Mr. Sykes' testimony as to Gallagher's confession to him was offered, there was an objection based only upon the assertion that any communication between he and Gallagher was privileged. (A. 52-53, 54, 55). The holding in *Miranda v. Arizona*, 384 U. S. 436 (1966) was not mentioned at that time, but later, in his oral argument for a dismissal at the conclusion of the State's case in chief (A. 69-73), touched upon that case while Mr. Schwarz, Gallagher's attorney, still disavowing his reliance thereon. (A. 71). However, after his conviction, Gallagher appealed as of right to the Ohio Second District Court of Appeals where, in his First Assignment of Error, he relied solely upon a violation of his rights under the Fifth Amendment to the Constitution of the United States allegedly violated by the admission of Mr. Sykes testimony in the absence of warnings; citing only *Miranda v. Arizona*, supra and *Mathis v. United States*, 391 U. S. 1 (1967).[2] The Court of Appeals affirmed. 36 Ohio App. 2d 29, 301 N.E. (2d) 888, 65 Ohio Opns. (2d) 17. (A. 11).

The Supreme Court of Ohio then granted leave to appeal. (A. 12, 14). In his memorandum seeking review

[2] The second and only other Assignment of Error, was, in effect, that the verdict was against the manifest weight of the evidence.

in that Court and in his brief on the merits, Gallagher assigned only one error, i.e., the overruling of his first Assignment of Error in the Court of Appeals. The reason for said alleged error by the Court of Appeals as set forth by Gallagher in both the memorandum and the brief was in not allowing his contention that the trial court violated the Fifth Amendment to The United States Constitution as imposed on the States by the Fourteenth Amendment thereto in denying him his self-incrimination privilege when it admitted his confession to parole officer Sykes. Gallagher's sole cited authorities for this contention were the United States Constitution and the *Miranda* and *Mathis* cases, supra. The Supreme Court of Ohio reversed the Court of Appeals on the ground that there was error of a constitutional dimension in the admission of said testimony of the parole officer in that Gallagher was compelled to be a witness against himself unless the warnings set forth in Miranda v. *Arizona*, supra, were first recited to him by the parole officer. 38 Ohio St. 2d 291, 67 Ohio Opns. 2d 534. (A. 14, 15, 16).

The decisions of the Ohio Court of Appeals and the Ohio Supreme Court are both set forth in the Appendix to the Petition for Writ of Certiorari herein. This Court granted a Writ of Certiorari on March 31, 1975.

SUMMARY OF ARGUMENT

In a criminal case where a parolee is interviewed or questioned by his parole officer, the *Miranda* situation is not analogous and, therefore, that case is not controlling. This is because the interviews are not "incommunicado interrogation . . . in a police dominated atmosphere." *Miranda* v. *Arizona*, 384 U.S. 436, 445. Therefore, the *Miranda* method of finding compulsion is not available.

The question thus becomes one of extending *Miranda* beyond its scope or of not doing so.

If the *Miranda* decision is not sound, it should not be extended and it is not sound because interrogation and questioning are not compulsion as meant by the compulsory self-incrimination clause of the Fifth Amendment and because honest policemen do not need a deterrent and dishonest ones won't heed it. Furthermore, the first duty of government is to protect its citizens and it cannot do this when police work is hampered by artificial rules and reliable evidence of guilt is rejected by same.

Even if the need for a prophylactic rule for policemen is conceded, there is no need for such a rule for parole officers since absolutely none of the factors which motivated the Court in *Miranda* exist in their interviews with their clients. Therefore, coerced confessions are not likely.

The institution of a prophylactic rule for parole officers would destroy their relationship with parolees and would seriously degrade the function of the parole officer. For this destruction, there are no redeeming factors, but quite to the contrary, many disabling ones; e.g., a vicious criminal could go free because the parole officer erred. The primary function of government would be seriously crippled by such a rule both in its regulative as well as in its rehabilitative efforts.

Finally, if a law enforcement officer adequately delivers *Miranda* warnings which are understood and waived, repeated warnings for repeated interviews at fairly close intervals are not necessary and should not be required since the person then knows his Constitutional Rights and cannot say that he does not know them and that he was not warned. He can exercise them at any time. This is even more forcefully true when the second interview is between a parolee (already advised) and his parole officer where no compelling influences exist. These cases should be decided on due process grounds.

ARGUMENT

I.

IN THE INTEREST OF JUSTICE, THE ABSOLUTE EXCLUSIONARY RULE OF MIRANDA V. ARIZONA SHOULD NOT BE EXTENDED TO INTERVIEWS BETWEEN PAROLE (OR PROBATION) OFFICERS AND THEIR CLIENTS BECAUSE SUCH INTERVIEWS ARE NOT INHERENTLY COMPULSORY.

Despite the fact that the parolee, Gallagher, freely and willingly told Mr. Sykes what he did (A. 64, 77), the Ohio Supreme Court decided that he was compelled to confess by a violation of the compulsory self-incrimination clause of the Fifth Amendment to The United States Constitution. That Court found compulsion in the assumption that "—a parolee is under heavy pressure to cooperate with his parole officer." 38 Ohio St. 2d 291, 297; Pet. 20[4] and that such compulsion continued in effect unless and until the parole officer, prior to questioning the parolee, issued warnings to him identical in substance to those required by *Miranda v. Arizona*, 384 U.S. 436, 444. The Court's finding was based on the *Miranda* decision which itself found that the defendants' in the four cases there involved were also compelled to confess because of "incommunicado interrogation . . . in a police-dominated atmosphere . . . without full warnings of constitutional rights." *Miranda v. Arizona*, 384 U.S. 436, 445. Thus, in neither of these cases were the statements of the individuals involved found to be "involuntary in

[4] Pet. refers to the Petition For Writ of Certiorari filed herein on October 29, 1974.

traditional terms." *Miranda*, supra, at 457. The Ohio Supreme Court followed the reasoning of a United States Fifth Circuit Court of Appeals case involving circumstances: *United States v. Deaton*, 468 F. 2d 541 (1972).

By it's decision, the Ohio Supreme Court interpreted the Compulsory Self-Incrimination Clause of the Fifth Amendment to The United States Constitution and applied it to this case and to types of factual situations like and similar to it and, in so doing, followed *Miranda v. Arizona*, supra. However, even if the *Miranda* decision should be accepted as a sound exposition of that clause of the United States Constitution, it was not available as a precedent for this case since the facts were not in point because here Gallagher was not subjected to "incommunicado interrogation . . . . in a police dominated atmosphere". *Miranda*, infra. None of the conditions found to be present in *Miranda* existed here as Mr. Sykes was not a police officer[5] and Gallagher was not really even questioned, let alone interrogated.[6] (A. 51, 53, 54, 64).

Inasmuch as the *Miranda* cases and this one do not seem to be analogous, the question then becomes one as to whether Miranda's principles of Constitutional Law should be extended to this case and to factual situations in apposition to it. As well as the United States Circuit Court case followed by the Ohio Supreme Court, there are three state cases which are somewhat similar to this one. *State v. Lekas*, 201 Kan. 579, 442 P. (2d) 11 (1968); *State v. Williams*, 486 S. W. 2d 468 (Missouri Sup. Ct. 1972); and *People v. Gastelum*, 237 Cal. App. (2d) 205, 46 Cal. Rptr. 743 (1965). However, in those cases, the

[5] He did not have general arrest powers; only enough to arrest a parole violator. (A. 63).

[6] Interrogation: to question typically with formality, command, and thoroughness for full information and circumstantial detail: to examine in detail. Webster's Third New International Dictionary.

parole officers did interrogate the prisoners either for the police or with them and no prior warnings had been given to said subjects. Therefore, they are not in point. Five states have held that a confession given to a parole or probation officer will not be suppressed because no *Miranda* warnings were given to the confessor, viz.: *Cunningham v. Texas*, 488 S. W. (2d) 117 (1972) (Texas Court of Criminal Appeals); *State v. Johnson*, 202 N. W. (2d) 132 (1972) (South Dakota Superior Court); *People v. Ronald W.*, 24 N. Y. (2d) 732, 302 N. Y. S. (2d) 260, 262 (1969) (Court of Appeals); *Gilmore v. People*, 171 Colo. 358, 467 P. (2d) 828 (1970) (Colo. S. Ct.); and *Nettles v. State*, 248 So. (2d) 259 (Florida Dist. Court of Appeals, 1971). There is, therefore, a conflict on this federal issue between the State Courts and the United States Courts of Appeal.

Since there is a conflict, the question as to extending the *Miranda* doctrine cannot be resolved by a resort to authority; which leaves reason as our only guide. Before addressing the extension question directly, perhaps *Miranda* itself should be examined with respect to its cogency as constitutional law in the field of confessions.

As the writers understand it and, perforce, encapsulated, the history of the law's treatments of confessions commenced with the general rule that they were considered the best of evidence and were rejected only if, for some reason (such as a finding of threats or promises) they were found to be unreliable or untrustworthy in the search for truth. This remained the rule and it was applied with varying degrees of severity or laxity until the United States Supreme Court, in a progression from *Ashcraft v. Tennessee*, 322 U. S. 143 (1944) up through *Miranda*, supra, *Mathis v. United States*, 391 U. S. 1 (1968) and *Orozco v. Texas*, 394 U. S. 324 (1969) and

using the Fourteenth Amendment to The United States Constitution, moved from "inherent coercion" and "voluntary" rules to the per se exclusionary rule of *Miranda*, supra, wherein the compulsory self-incrimination clause of the Fifth Amendment was applied to confessions to law enforcement officers in state criminal cases. Wigmore, Vol. III, Chadbourne Revision, Sec. 817 et. seq. And this was despite the fact that, historically and rationally, the anti-compulsory self-incrimination concept developed and was applied quite separate and apart from the untrustworthy confession concept. The anti-compulsory self-incrimination privilege was confirmed to the formal adversary proceedings before a tribunal whereas the untrustworthy confession concept was applied to the pre-trial fact gathering process.

In addition to using that clause of the Fifth Amendment, the Court strained to find compulsion in *Miranda* and, having found it in the inherently compulsory atmosphere of the police station, fashioned a sort of litmus test to determine the presence or absence of compulsion in like situations. The test was, of course, the well-known *Miranda* warnings, the absence of which when the police did not convey them to a suspect in some way and the suspect did not waive thereafter his new-found rights under the Fifth Amendment, caused an automatic rejection of any admissions or confessions which he might have given to the police; no matter how voluntary or reliable the statements might be considered to be. The Court, then, went on to say:

> "In these cases, we might not find the defendants' statements to have been involuntary in traditional terms." Miranda, supra, 457.

The clause of the Fifth Amendment in question, however, states that:

> "No person . . . shall be compelled in any criminal case to be a witness against himself".

But, when one considers the history of the governmental practices (Star Chamber and the like) which that clause intended to forbid in these states and the lexicographic meaning of the word "compel", it is inconceivable that the same action could be both compelled and voluntary. It is almost a contradiction in terms. And if the atmosphere somehow "compels" the confession without the warnings, how do the warnings and, or, the presence of a lawyer remove this atmospheric compulsion? This was pointed out by Mr. Justice White in his excellent dissenting opinion in *Miranda*, supra.

Perhaps realizing that it was contradictory to mate compulsion and voluntariness, the Court in *Miranda* went on to indicate that the prescribed warnings were being required in order to deter wrongful police behavior. Do they deter wrongful or righteous police behavior? It is submitted that the latter is the case, since, in the first place, the honest, moral, law-abiding policeman (which category includes the vast majority of policemen) does not need an artificial deterrent and, in the second place, it is highly questionable that such a procedure would deter the other kind of policeman because he's the only kind who cannot comprehend the utter lack of efficacy of a phony confession. Furthermore, if the Court cannot believe him when he states that he did not use coercive tactics to obtain the confession, how can it believe him when he avers that he gave the warnings?

Assuming, arguendo, that the warnings would act as a deterrent for this tiny minority of dishonest policemen, is it not more likely that, by using the warnings, the honest policemen are going to solve less crimes by not getting statements and the leads which often evolve there-

from than it is that many unreliable confessions will result without them? In addition to this, and as a matter of fact, the negligent omission, partially and completely, to deliver the *Miranda* warnings has caused, and will continue to cause, the rejection of completely voluntary and perfectly reliable statements and confessions resulting in a failure to convict the guilty perpetrators of even the most dastardly of crimes. This is hardly in keeping with the primary and sacred duty of any Government which is to protect it's citizens from predatory behavior.

Therefore, even if it is necessary in balancing the interests to sometimes accept an otherwise reliable statement which was extracted by unsavory means (this would be a rara avis, indeed, since these would almost always be rejected as being untrustworthy), in the interest of justice and truth-seeking, it should be done so that the primary duty of Government can be discharged; especially in the cases where there is no overbearing but simply a careless failure of a government official to comply with a procedure such as the *Miranda* warnings.[7]

If the foregoing considerations are correct, the decision in *Miranda*, supra, would not seem to be a valid interpretation of the United States constitutional provision in question. If this is so, and even if it is not so, it is respectfully submitted that this doctrine should not be extended from the police station to the parole, and, or, probation offices or to their procedures as the Ohio Supreme Court has done in this case. For there is even less reason to suppose that the Fifth Amendment's word "compelled" can be, by implication, extended to these officers by some sort of "inherently compelling pressure" analogy because the circumstances and conditions

[7] See Part IV of the dissent of Mr. Justice White in Miranda, supra, commencing at page 537 of 384 U. S. Reports and the opinion in Michigan vs. Tucker, 417 U. S. 433, Part IV, 446, ff.

which worried the Court in *Miranda* are not even remotely possible in the situations involving such officers and their "clients".

The interviews between parolees and parole officers could not be characterized as "incommunicado interrogation . . . in a police dominated atmosphere". We know of no instances of beatings and the like by parole officers or of parole officers flagrantly violating the law (*Miranda pp. 446-7*), nor of the use of psychological ploys and pressures by parole officers (*Miranda, 448 ff.*). The interview is not likely to evolve into an "interrogation". The parolee or probationer is not likely to be "swept from familiar surroundings into police custody [and] surrounded by antagonistic forces" (*Miranda, 461*). Quite the contrary is true, since the parolee or probationer is, by definition, a convicted criminal and thus is in very familiar surroundings and in the presence of friends, so to speak.

Indeed, this case illustrates the absence of all of those factors which worried the Court so in *Miranda* and there are no additional factors to replace them as compelling influences. There are, however, factors present in this case and which would be present in similar ones which would tend to strengthen the inclination to place credence in confessions to parole officers. These factors are: the strong desire of the parolee not to return to jail which would mitigate the possibility of his falsifying; and his former experience with prosecutions which would imply that he already is well aware of his constitutional rights.

Therefore, since the situation in this case surrounding the giving of the confession did not involve a "compelling atmosphere" nor any of the other *Miranda* factors, there is no need to require a prophylactic rule to eliminate the possibility of a false confession or to act as a

deterrent to prevent parole and probation officers from violating the law. But, Ohio (and some other States and Federal Courts) have already extended *Miranda* to this case and cases like it and Ohio has promulgated a prophylactic rule identical to *Miranda's* under the theory that the parolee (and probationer, by extension) is under "heavy pressure to cooperate with his parole officer". (Pet. 20). That is the only reason they give for finding compulsion. Any questioning involves some pressure. In that sense, only a blurted out confession would be uncompelled. We are all under pressure to tell the truth since there are many occasions when it would be easier to lie. But, surely that is not what is meant by our Constitution when it uses the words "compelled to be a witness against himself". If so, we are all compelled every day to be so. Something *more* than "heavy pressure" was meant and it was the use of force, threats, or sanctions involving life, limb, or property in order to persuade a person to implicate himself.

Further than these considerations concerning what seems to be an incorrect interpretation of the Fifth Amendment and the *Miranda case*, there are the practical implications of what would be involved in adopting the construction opted for by the Ohio Supreme Court. That Court, in its opinion, says that a confession to a parole officer given without the warnings, is "inadmissible at trial" (Pet. 20, 38 Ohio St. 2d 291, 297). This will pretty quickly be construed to mean **at a revocation hearing or proceeding.** Therefore, every time a parolee or probationer sees his officer, the warnings will have to be given and a lawyer provided, if requested. This would not seem to be a commendable method for the promotion of a healthy or beneficial relationship between the parties; nor one conducive to the rehabilitation purposes of the

parole and probation programs. This extension will, as Mr. Justice White said in *Miranda,* supra, at page 541 "measurably weaken the ability of the criminal law [through its parole and probation programs] to perform [it's] tasks."

In conclusion with respect to this question, we refer to the concept set forth in *Michigan v. Tucker*, 417 U. S. 433 at p. 450: "For when balancing the interests involved, we must weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce." Even conceding the "harm" to criminals of admitting at the trial confessions related to their parole officers, when balancing the interests between these criminals and the public, who is harmed more greatly when voluntary and reliable statements such as these are suppressed or prevented from coming into existence?

It is the duty of government to protect its citizens from criminals. This will not be accomplished by suppressing evidence such as the confession in this case nor by setting up prophylactic rules whose result will be to impede the search for truth.

> "We are, after all, always engaged in a search for truth in a criminal case so long as the search is surrounded with the safeguards provided by our Constitution."
>
> *Oregon v. Hass*, No. 73-1452, 95 S. Ct. 1215, 1221.

Constitutional safeguards were designed for the protection of the innocent, not the freeing of the guilty. But what constitutional safeguards were denied to Gallagher? His statement to Sykes was as much a product of his own free will as a man's statement could possibly ever be and it was confirmed by the subsequent fact of Sykes' finding

of the wig. Wigmore Vol. III § 856.

> "There is no evidence or suggestion that Hass' statements. . . . . were involuntary or coerced. He properly sensed, to be sure, that he was in 'trouble'; but the pressure on him was no greater than that on any person in like custody or under inquiry by any investigating officer." *Oregon v. Hass*, supra.

For what do we need the constitutional safeguards? Why, to insure our finding the truth. This case and *Hass*, supra, merely illustrate the viability of the fact finding processes we have and the futility, as well as the unconstitutionality, of such prophylactic rules as the Ohio Court has promulgated here under the aegis of *Miranda*. What should a good police officer do as in *Hass*, supra; stop and call a lawyer or go get the bike? What would a lawyer tell a parole violator before his interview with his parole officer; to confess?

Relevant and material and trustworthy evidence should be rejected only if it is demonstrably unreliable.

> "If, in a given case, the officer's conduct amounts to an abuse, that case, like those involving coercion or duress, may be taken care of when it arises measured by the traditional standards for evaluating voluntariness and trustworthiness."
> *Oregon v. Hass*, 95 S. Ct. 1215, 1221.

That is the test of constitutionality which should be applied to the case at bar and to those like it.

II.

ONCE MIRANDA WARNINGS HAVE BEEN GIVEN TO A PERSON AND THEY ARE FULLY UNDERSTOOD AND THAT PERSON WAIVES HIS CONSTITUTIONAL RIGHTS, A CONFESSION OR ADMISSION OBTAINED AT A SUBSEQUENT INTERVIEW SHOULD NOT BE SUPPRESSED SIMPLY BECAUSE NO OR INADEQUATE WARNINGS WERE GIVEN TO THE PERSON PRIOR TO THAT INTERVIEW.

This case also contains the important question as to whether Miranda warnings must be repeated and again there is a conflict. However, the conflict is mild since the general rule is that the warnings do *not* have to be repeated. In a few cases, repetition is required: *Davis v. State*, 44 Ala. App. 145, 204 So. (2d) 490 (1967); *Brown v. State*, 6 Md. App. 564, 252 A. (2d) 272 (1969).

The vast majority of the cases do not require repetition:

Maguire v. United States, 396 F. (2d) 327 (9th Circuit 1968); *Miller v. United States*, 396 F. (2d) 412 (8th Circuit 1968); *United States v. Mansfield*, 381 F. (2d) 961 (7th Circuit 1967); *People v. Hill*, 66 Cal. (2d) 536, 426 P. (2d) 908 (1967); *People v. Hill*, 39 Ill. (2d) 125, 233 N. E. (2d) 367 (1968); *State v. Rowe*, 77 Wash. (2d) 955, 468 P. (2d) 1000 (1970); *United States v. Canseco*, 465 F. (2d) 383 (5th Circuit 1972); *Commonwealth v. Abrams*, 443 Pa. 295, 278 A. (2d) 902 (1971); *Watson v. State*, 227 Ga. 698, 182 S. E. (2d) 446 (1971). Again it is noted that there is a conflict between Federal Courts and State Courts on this important Federal question.

The *Maguire* case (396 F. 2d. 327) will be referred to both because it is very similar to this case and because it was cited by the Ohio Court of Appeals in its decision. Pet. 27; 36 Ohio App. 2d 29, 32-33. 301 N.E. (2d) 888, 890. In that case, Maguire was arrested by a Customs agent, then turned over to a San Diego police officer, Hammond, who gave him proper *Miranda* warnings. Three days later, a government agent, Turnage, questioned him, but his *Miranda* warnings were seemingly defective. Both Hammond and Turnage were permitted to testify. The Ninth United States Circuit Court of Appeals said:

> "Officer Hammond's warning, which was clearly adequate to meet the Miranda standards, came three

days before the interrogation of appellant by Agent Turnage; thus, even if the warning given by Turnage was insufficient, the appellant could not claim he had *not* been apprised of the *Miranda* warnings." *Maguire*, supra at p. 331.

Therefore, in the time lag between the interviews and in the fact that two different people questioned Maguire, the cases are almost identical, although it is conceded that Agent Turnage would be a law enforcement officer for *Miranda* purposes whereas it is highly questionable as to whether Parole Officer Sykes would be. But, this is just the point where this case is stronger than Maguire and the Ohio Supreme Court simply ignored this issue although it had been passed upon by the Montgomery County Court of Appeals and was briefed in both Courts. While brushing this point aside, the Ohio Supreme Court nevertheless conceded, in effect, that the prior *Miranda* warnings were proper. (Pet. 15, f.n. 2); (38 Ohio St. 2d 291, 292 f.n. 2).

Two of the cases previously cited hereinabove are also in point factually since in each of them the police fully advised the defendant of his constitutional rights and he had adequately waived those rights. Those cases are: *Gilmore v. People*, 171 Colo. 358, 467 P. (2d) 828 (1970) and *Nettles v. State*, 248 So. (2d) 259 (Fla. Dist. Ct. of Appeals). In the Florida case, the court made a very cogent observation:

> " . . . if upon every visit or contact with the probation officer the probationer is entitled to a warning then the relationship between the probation officer and the probationer would be a strained one indeed and the purpose of probation would be materially affected." 248 So. (2d), at 260.

In this case, and in others like it, as well as those involving law enforcement officers, the prior warning

should be sufficient. In the first place, Sykes was not a law enforcement officer as they were characterized by the *Miranda* decision. He had no general arrest powers (A. 63) and in *Miranda*, the term "police" was used repetitively whereas the term "law-enforcement officer" was used sparingly. Therefore, it is clear that the court was talking about policemen, F. B. I. agents, and the like. In the second place, and generally, how could Gallagher, or anyone else under the circumstances, claim he had *not* been warned and, in fact, Gallagher admitted that he had. (A. 79). Additicnally, Gallagher knew the person to whom he was talking, as do all parolees and probationers, and he knew his constitutional right to keep silent. That is illustrated by the fact that he refused to talk on Sykes' first visit. (A. 53). When he talked, he surely knew Sykes' could recommend a revocation. He probably thought he was going back anyway since he had admitted committing Armed Robbery to Detectives Walsh and Wright. Furthermore, as a parolee, he knew all about his Fifth and Sixth Amendment rights.

Gallagher had already been apprised of his Fifth and Sixth Amendment rights and had waived them. Therefore, the danger of a compelled confession which so worried the Court in *Miranda* was substantially reduced because he now knew his rights and could simply have exercised them. Also, after a man has already been warned, the rationale of the lonely man caught up in the toils of the law loses whatever reasonableness it ever did possess.

If we wish to insure a product of free choice, how many warnings do we need? Surely the insurance of the warnings does not lapse within three or four days. In reality, what is involved here is the obvious fact that if a person receives the full panoply of warnings, fully un-

derstands them, and waives the rights delineated thereby, he certainly will remember those rights three or four days later. There is, therefore, no necessity to adopt a per se rule which would automatically reject a competent, relevant, and reliable confession, made at a later time just because the warnings were not repeated.

> "To adopt an automatic second-warning system would be to add a perfunctory ritual to police procedures rather than providing the meaningful set of procedural safeguards envisioned by *Miranda*. *Gorman v. United States* (1st cir.) 380 F. 2d 158, 164." *People v. Hill*, 39 Ill. (2d) 125, 233 N. E. (2d) 367, 371.

If his will is overborne at that time, the traditional "totality of the circumstances" approach will be completely adequate for the protection of his rights and of the truth-seeking process.

At the conclusion of his dissent in *Miranda*, supra, 384 U. S. at page 526, Mr. Justice Clark stated:

> "The foray which the Court makes today brings to mind the wise and farsighted words of Mr. Justice Jackson in *Douglas* v. *Jeannette*, 319 U. S. 157, 181 (separate opinion): 'This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many has been added.

The Ohio Court, in its zeal to apply the *Miranda* decision to this situation, completely ignored the fact that Gallagher was warned, knew his rights, and did not claim that he did not know them but admitted that he was warned. By its actions in this regard, that Court has vitiated a perfectly valid, reliable, trustworthy, and voluntary confession made by a dangerous criminal; an armed robber. The temples surely have collapsed.

Since none of the conditions which evoked the *Miranda* rule in the first place are likely to exist when a succeeding interview ensues subsequent to a valid rendition and adequate understanding of the warnings given at the inception of the initial interview, a per se exclusionary rule should not be proclaimed relative to the product of that subsequent interview. Even if such a rule were contemplated, how could an intelligent one be drafted with respect to the lapse of time, number of interviews, and myriad other problems in this regard? Would one hour require more warnings, or one day? Another Ashcraft rule (*Ashcraft v. Tennessee*, 322 U. S. 143) is not needed here and now, but a return to the traditional due process method of sorting out untrustworthy confessions is.

CONCLUSION

For the above reasons, it is respectfully requested that this Honorable Court reverse the decision of the Ohio Supreme Court because that decision reflects an incorrect interpretation and application of the compulsory self incrimination clause of the Fifth Amendment to the United States Constitution and that this Honorable Court remand this case to the Ohio Supreme Court with instructions to reinstate and affirm the decision of the Montgomery County Court of Appeals.

Respectfully submitted,

LEE C. FALKE,
Prosecuting Attorney of
Montgomery County, Ohio

HERBERT M. JACOBSON,
Chief Trial Counsel

RANDAL A. ANDERSON, JR.,
Assistant Prosecuting Attorney

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-492

STATE OF OHIO,

Petitioner,

v.

TERRY L. GALLAGHER,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF FOR THE RESPONDENT

JACK T. SCHWARZ
Harrison & Schwarz
730 South Main Street
Dayton, Ohio 45402
Attorney for Respondent

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TERRY L. GALLAGHER,

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ON WRIT OF CERTIORARI TO THE
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BRIEF FOR THE RESPONDENT

QUESTIONS PRESENTED

I.

Should the Miranda Rule be extended to a parole officer when he interviews a Defendant, parolee, who is incarcerated on a new charge so as to exclude the parole officer's testimony in a later trial as to defendant's statements to him if the parole officer did not advise his parolee of his right to remain silent, his

right to counsel, the fact that any statements he makes can and will be used against him at trial?

II.

Assuming that a parole office is required to give said Miranda Warnings, is a previous recitation of the Warnings of the police officers sufficient where it has been followed by promises made to the Defendant for the purposes of gaining a guilty plea?

STATEMENT OF THE CASE

On or about May 27, 1972, the Seven/Eleven Store, located at 405 Xenia Avenue, Dayton, Ohio, was the scene of an armed robbery. According to the testimony of the clerk who was robbed at that time, there were approximately six persons within the store. Two men standing side by side were within arms length, one with a gun. According to the testimony of the victim, one of the robbers was a tall man who had the gun, who made all the statements as to taking the money, and who, in fact, did all the actions alleged to have occurred. The victim then identified the Respondent as the person standing next to the man conducting the robbery. The victim admitted that Respondent said nothing, did nothing, had no weapon, did not place said victim in fear and in no way physically or orally participated in any manner in the conduct of the robbery.

Respondent was arrested in connection with the above described robbery and on June 22, 1972, was interrogated by a Detective Wright and Detective Walsh.

On said date Defendant executed a Rights Waiver setting forth the rights proscribed by *Miranda v. Arizona,* he was subsequently interrogated by the said Detectives, Wright and Walsh. During the course of said interview or interrogation, the detectives confronted Respondent with a co-defendant whom they indicated "copped out" to the charge. Further, a "deal" was made with Respondent that if he would plead guilty to the robbery of the Seven/Eleven Store no further charges would be brought against him. (Ap 32) It further appeared from the testimony of Detective Wright that the charges that would not be filed were not, in fact, provable against this Respondent and the co-defendant. (Ap 32-33) It should be noted that these promises not to prosecute on additional charges were made on June 22, 1972. On June 26, 1972, subsequent to the promises that were made to Respondent, Parole Officer Sykes appeared at the City of Dayton Jail where Respondent was incarcerated to discuss the charges of robbery with Respondent. It should also be noted that respondent was at that time on parole and in the charge of Parole Officer Sykes; respondent refused to discuss the matter. Parole Officer Sykes returned to the Dayton Jail to again discuss with Respondent this alleged crime on July 3, 1972, and as a result of this conversation, Parole Officer Sykes was permitted to testify over objection as to statements made to him by Respondent in the July 3, 1972 interview. On the basis of the statements made during said interview, Defendant was convicted of the crime of armed robbery and was sentenced to 10 to 25 years in the Ohio State Penitentiary.

An appeal was duly taken and on May 30, 1973, the Court of Appeals for Montgomery County, Ohio

affirmed the Judgment of conviction. An appeal was taken to the Ohio Supreme Court and on June 26, 1974, the Ohio Supreme Court reversed the conviction holding that "testimony as to utterances made by the accused to his parole officer is inadmissable at trial where the utterances were in response to questions by the parole officer, and, prior to the questioning the parole officer failed to advise the accused of his right to remain silent, his right to be provided with counsel prior to questioning and to warn him that any utterances may be used as evidence against him."

ARGUMENT

I.

A HOLDING OF *MIRANDA V. ARIZONA* INCLUDES PAROLE OFFICERS OR ANY OTHER AUTHORITIES WHO INTERROGATE OR INTERVIEW PERSONS WHO ARE INCARCERATED AND RESTRAINED OF THEIR FREEDOM IN A COMPULSORY ATMOSPHERE AND THE JAIL.

Respondent contends that under the Statutory Law of the State of Ohio, the parole officer, acting under color of authority of the Adult Parole Authority, is in effect, a police officer, as invisioned by the intent, if not the exact letter, of the ruling of the case of *Miranda v. Arizona* 384, U.S., 436 (1966)

> "There is hereby created in the Division of Correction of the Department of Mental Hygiene and Correction at bureau level an 'Adult Parole Authority'. . . ."

SECTION 5149.03 OHIO REVISED CODE, provides as follows:

> "The adult parole authority shall administer Chapter 5149 and provisions of chapter 2967.00 and Sections 2301.27, 2301.32 inclusive, 2905.28, 2941.46, 2951.05, 2951.06 and 2951.08 of the Revised Code, as imposed duties upon the Authority."

Sections 2941.46, 2951.05, 2951.06 and 2951.08 are Statutes empowering persons designated as probation officers, deputy sheriffs, police officers, etc., to make arrests under given circumstances. By granting or imposing upon the Adult Parole Authority the provisions of each of the Sections and by empowering it's parole officers to act under such sections, the Legislature has, in effect, if not, in fact, given to the parole officer the authority to make arrests, to incarcerate persons and to, in general, carry out many of the activities carried out by duly authorized, sworn police officers.

Section 5149.05, OHIO REVISED CODE, in fact, gives parole and field officers of the Adult Parole Authority the authority to carry firearms. Section 5149.23(a) OHIO REVISED CODE, gives the Adult Parole Authority the authority to deputize agents, which shall have all the powers of police officers in this State.

In addition, parole officers have the authority to arrest persons under their control for *suspected* violations of the conditions of their parole, to place parole detainers on persons arrested for crimes even before they are, in fact, convicted of such crimes, and to in many ways deprive persons of their freedom.

To say that such persons are not "police officers" of the State is to, in fact, completely ignore the intent of the decision in *Miranda v. Arizona* supra. In the instant case, the parole officer admittedly questioned Respondent, or if the Court prefer, discussed the matter with Respondent, while Respondent was incarcerated in the Dayton Jail. (BE 151-159) The parole officer admitted (BE 165) that he had the power to recommend the returning time of parolees to the penal institution from whence they were paroled. The parole officer admitted (BE 151) that on June 26, 1972, when he had attempted to question Respondent with regard to this matter, Respondent stated that he did not wish to make a statement with regard to the circumstances surrounding his arrest for this alleged crime.

The parole officer testified (BE 166-167) that he did not, in any manner, advise Respondent of his Constitutional rights, his right to counsel, his right to remain silent, that anything he said could and would be used against him in Court.

Further, the Court's attention is directed to the case of *Mathis v. United States* 391 U.S., 1

In that case, a Petitioner was convicted in the United States District Court on two counts of "knowingly filing false claims" in connection with his tax returns. The Petitioner was incarcerated in a state penal institution on a state charge. During such incarceration, an investigator from the Internal Revenue Service questioned the Petitioner on numerous occasions, eliciting statements and documents which were substantially and subsequently presented in the prosecution of the Petitioner under the federal charges.

The tax investigator admittedly did not advise the Petitioner of his Constitutional rights under the *Miranda*

v. Arizona Decision. In considering whether or not the tax investigator was required to so advise the prisoner, the Court held that (p. 4)

> "It is true that a routine tax investigation may be initiated for the purpose of a civil action rather than criminal prosecution. To this extent, tax investigations differ from investigations of murder, robbery and other crimes. But tax investigations frequently lead to criminal prosecutions just as the one here did . . . and, as the investigating Revenue agent was compelled to admit, there was always the *possibility* during his investigation that his work would end up in criminal prosecution. We reject the contention that tax investigations are immune from the Miranda requirements for warnings to be given to a person in custody" . . . . (emphasis added)

> "The government also seeks to narrow the scope of the Miranda Holding by making it applicable to only questioning of one who is in custody in connection with the very case under investigation. There is no substance to such a distinction, and, in effect, it goes against the whole purpose of the Miranda Decision, *which was designated to give meaningful protection to Fifth Amendment Rights.*" . . . . (emphasis added)

As is stated in *Miranda v. Arizona,* 384 U.S., at Page 478:

> "To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the *authorities* in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized."

It is Respondent's contention that the parole officer, William Sykes, had a duty to inform Respondent of his rights to an attorney, to remain silent and most

important, that any statements he made could and would be used against him in any trial of this cause.

In comparing the instant case with the case of *Mathis v. U.S.* the Court may state or may feel that tax investigations are entirely different than investigations conducted concerning a robbery. However, the important language in that case is that investigations frequently lead to criminal prosecution, just as the one here did, and is even more important to the instant case.

In the instant case, Respondent was not only a suspect in the crime which was the cause of this trial, but was, in fact, charged with the offense of armed robbery at the time he was questioned by Mr. Sykes.

It is undisputed in the record that the parole officer, William Sykes, knew that Respondent, was in fact, charged with armed robbery; and that he must have known that his testimony could have been used at trial. For this reason, alone, the parole officer should have advised the Respondent of his Constitutional Rights.

The cases relied upon by the Court of Appeals for Montgomery County Ohio, in dismissing appellant's appeal are summarized as follows:

People v. Ronald W., 24 N.Y. 2nd, 732, 302 N.Y.S. 2nd, 260, 262 (1962)

This case is clearly inapplicable to the instant case, inasmuch as, it involves a probation revocation proceeding and does not, therefore, involve the admissibility of statements of a probation officer in a trial of a probationer or parolee in a subsequent criminal proceeding.

In the *Ronald, W.* case the Defendant or Appellant, Ronald W. had been previously convicted of a crime and placed on probation. He, subsequently, in an

interview or discussion with his probation officer was noticed to have needle marks on his arm.

In a discussion with his probation officer regarding said needle marks, the probationer admitted that he had been using heroin which was a violation of the conditions of his probation.

The statements and admissions made to the probation officer were admitted in a subsequent probation revocation hearing wherein it was alleged that the probationer had violated the terms of his probation.

It should be noted that an express requirement of the probationer's probation in that case was that he answer all reasonable inquiries of this probation officer.

It should be further noted that the probationer was not, in fact, in custody at the time of the interrogation and, therefore, the provisions of *Miranda v. Arizona* would not apply.

That case has no applicability to the case at hand.

Gilmore v. People (Colorado), 171 Colo., 358, 457 P. 2nd 828 (1970) In this case, the Defendant-Appellant or as they are referred to in Colorado the Plaintiff-in-error was convicted of simple assault and of unnatural carnal copulation.

A part of the evidence presented against him was a statement or statements made to his federal probation officer.

Subsequent to his arrest, Gilmore denied any connection with the crime with which he was to be charged; however, he requested that his federal parole officer be called to the police station for a conversation.

At the police station, the Defendant made these statements which if not confessions, were in the nature of admissions against interest to his parole officer.

These statements were not elicited by parole officer, Fuller, nor did Fuller attempt to interrogate the Defendant about the crime with which he was charged.

As is quite obvious, the Gilmore case is distinguishable from the case at hand, inasmuch as the parole officer in that case was summoned to the police station by the Defendant who was at that time in custody. It should be noted that the Parole Officer was in no way attempting to question the Defendant about the crime with which he was charged. Such is not the case at hand. It is obvious from the testimony from the record, as indicated, that, in the instant case parole officer Sykes went to the jail, wherein, Respondent was incarcerated and on two occasions, not at the request of Respondent, but of his own volition. On June 26, Respondent refused to answer any questions concerning the offense with which he was charged. On July 3, he made statements to the parole officer with regard to the offense charged only upon questioning by parole officer Sykes. Clearly the statements made to the parole officer in the Gilmore case were not made in response to an interrogation as in the case at hand; and clearly, the Respondent herein did not summon or request the presence of parole officer Sykes as did Gilmore in the case of *Gilmore v. People.*

For these reasons, the case of *Gilmore v. People* herein cited, has no relevance and no applicability to the instant case.

Nettles v. State, (Florida) 248, 2nd, 259 (Florida District Court of Appeals, 1971)

The Nettles case cites the case of *People v. Ronald W.* supra and follows the theory of the case that a person who takes advantage of the parole opportunity waives his right to constitutional Miranda Warnings

when he accepts probation and states further that this waiver continues in effect even on a new and fresh crime as regards his probation officer.

This proposition has no validity taken in the context of the constitutional guarantees made to every citizen of the United States as is well pointed out by Judge Mann in his dissenting opinion in that case.

Judge Mann's dissenting opinion states, in part:

> "Such a proceeding is independent of the probation revocation proceeding unless the majority imply acceptance of probation carries with it an implied waiver of Constitutional Rights while probation continues. It is doubtful that even an expressed waiver of constitutional right in future cases could beheld but we need not contemplate that. I think it's clear that there is not a waiver of the Fifth Amendment by implication see *Spevack v. Klein,* 1967, 385, U.S., 511 87 Supreme Court, 616, 17 Lawyers Edition, September 5, 1974; *Garrity v. New Jersey,* 1967, 385 U.S., 493, 87 Supreme Court, 625, 17 Lawyers Edition Second 562."

It would appear that the Nettles' case and the case of *New York v. Ronald W.,* base their opinions upon the fact or the assumption in view of the case cited in Judge Mann's dissenting opinion.

State v. Johnson, (South Dakota), 202 N.W. 2nd, (1972) Defendant was charged with and found 'guilty' of the crime of obtaining money and property under false pretenses. According to the facts of the case, the Defendant was on probation for a previous violation and issued a check on a bank where he had no account. His probation officer testified that he went to Defendant's home to question him about the check issued; and that the two conferred in the yard outside

Defendant's home during which time Defendant admitted issuing the check but claimed it had been paid off.

Defendant contended that he had been subjected to custodial police interrogation and was entitled to a Warning of his Rights as required by Miranda. In overruling and/or dismissing Defendant's appeal the Court said:

> "Miranda Warnings do not have to be given on all interrogations. They must be given prior to questioning initiated by law enforcement officers after the person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Neither* of these compelling factors is present here". . . . (emphasis added)

The Court goes on to state that a probation officer does not have a peace officer's broad power of arrest.

The Johnson case is obviously, as the other cases cited by the Court, not applicable and is distinguishable from the present case. Apparently, the parole officers in this state have more broad arrest powers than the parole officers in the state of South Dakota. However, that is not the main distinguishing character of that case.

It is obvious from the statement that the two conferred in the yard outside the Defendant's home, that the Defendant was not in custody and merely had a conversation with his probation officer outside his home and not in the custody or in the custodial atmosphere of the police station.

In the instant case as previously mentioned, this Respondent was in fact, in custody and was questioned on not one, but on two occasions by his parole officer after said parole officer had been advised that the Defendant had no desire to discuss the case. The cases

binding as inadmissible statements made to parole officers without giving the person in custody the advice that he has a right to a lawyer and to remain silent are as follows:

People v. Gastelum, (Calif.) 237 Cal., App. 2nd 205, 46 Cal. R. 743 (1965).

The Gastelum case was decided by the District Court of Appeals Fifth District of California, September 23, 1965, prior to the United States Supreme Court holding in *Miranda v. Arizona.*

In that case, after discovering that his parolee had been using drugs prohibited by the terms of his parole, the parole officer accompanied by police officers went to the parolee's residence and found drugs. Subsequent to such findings, and while in custody, the parolee made confessions or admissions to his parole officer which had been admitted in his trial and which resulted in conviction. The California Court of Appeals stated that:

> "The only nominal question is whether, by analogy to the rule on search and seizure, Defendant's status as a parolee negated his Constitutional Rights to be advised of his right to counsel or to remain silent. The Supreme Court, in *People v. Derato*, Supra affirmed the right of a felon incarcerated in the state prison to be effectively informed of his right to counsel and of his absolute right to remain silent under the Fifth and Sixth Amendments. Certainly a parolee in constructive custody is no less entitled to these constitutional rights than is a felon in actual custody. Therefore, we conclude that the rule of Derato is applicable to a parolee and that it was a reversible error to admit Defendant's confession in evidence."

Further at page 746:

> "The Supreme Court of California, following principles enunciated by the United States Supreme Court, has held that the introduction of an involuntary confession elicited in violation of Defendant's rights under the Fifth Amendment to the United States Constitution constitutes a reversible error, per se."
>
> *State v. Lekas*, (Kansas) 201 Kan. 579, 442 P. 2d 11 (1968)

In the Lekas case Defendant was taken from his home by a parole officer and a police officer, being suspected of having a weapon in his possession and further being suspected of preparing to leave town. Based upon these suspicions he was, in fact, removed and taken to the police station where his parole officer alone questioned him regarding the possession of said weapon. The Defendant admitted the possession of the weapon to the parole officer and his admissions and subsequent evidence derived from said admission was introduced against him.

The Defendant was convicted and based his appeal upon the grounds that the parole officer did not advise him of his rights set forth in the Miranda decision. The Supreme Court of Kansas stated at page 15:

> "It should be emphasized that the issue here presented is not whether the Appellant's parole can be revoked after the Appellant confesses to the parole officer concerning a new crime, without first having been informed of his Constitutional Rights. Here the incriminating statements admitted into evidence were used to convict the Appellant for a new offense."

This is the issue confronting the Court.

The Kansas Statute sets forth the powers and authority of the Kansas State Board of Probation and Parole:

> "And all persons employed under the provisions of this act as probation or parole officers shall have and exercise police powers to the same extent as other peace officers and such powers may be exercised by them anywhere within this state."

The Kansas Court further states that on page 15:

> "As we construe the Miranda Decision, if the incriminating statements elicited from the Appellant while in the custody of the parole officer upon interrogation were to be used for the prosecution of a new offense, the parole officer was required to give the Miranda Warning."

The Kansas Court then goes on to cite the case of *Mathis v. United States* 391, U.S. 1, 88 Supreme Court 1503, 20 Lawyers Edition Second 381, (May 6, 1968)

The Mathis case, of course, is cited in this Brief although not referred to in the decision rendered by the Court of Appeals for Montgomery County.

It should be further noted that the authority conferred upon the parole officers of the State of Kansas is not that much more broad than those conferred upon parole officers for the State of Ohio. The Kansas Court further stated at Page 16:

> "In a situation of this kind the truth of the incriminating statements is immaterial."
>
> *State v. Williams* (Missouri, 486 S.W. 2nd 468 Missouri Supreme Court, 1972)

Defendant, parolee, was a resident at a regional treatment center and his parole officer made a warrantless exploratory search of his knapsack found on top of his dresser in a closet in his room and found

marijuana. Subsequent, to this finding, the Defendant was taken to the city police station where the parole officer advised him of his Miranda Rights, however, the parole officer failed to inform the Defendant that if he could not afford an attorney one would be appointed for him.

The Supreme Court of Missouri held that any statements taken subsequent to the advising of the rights and also subsequent to the failure to advise the Defendant that he could have a court appointed attorney, were inadmissible.

The Supreme Court of Missouri held that the search of the Defendant's belongings while in this semi or quasi custodial situation was not in fact, constitutional. That Court stated, however, at page 473:

> "The judgment of conviction, however, must be reversed for error in the admission of evidence of (1) the testimony of parole officers Perry and Cothman, both of whom testified that following his arrest and at the city police station under questioning by officer Perry, appellant admitted that he acquired possession of the marijuana after Officer Perry, having advised appellant of Miranda rights failed to inform him that the court would appoint an attorney for him if he could not afford one; (2) the testimony of police officers who subsequently took a written confession from appellant, and (3) the written confession."

That Court further held that:

> "Miranda requires officers of the Missouri State Board of Probation and Parole in the investigation of facts involving the possible commission by an indigent parolee of a fresh or new felony to give the parolee all four of the Miranda Warnings, where he has been arrested and taken into actual police custody."

As stated in the decision of the Ohio Supreme Court in the case *U.S. v. Deaton*, (C.A. 5, 1972) 468 F. 2d. 541 Certiorari denied, 410 U.S. 934 squarely confronts the precise question presented by this case, at page 544:

> "Deaton's parole officer testified over objection, to statements made to him by Deaton tending to incriminate Deaton on the harboring and concealing charge, uttered in response to the direct interrogation by the parole officer when Deaton was in custody, even without the officer having given Deaton the Warnings required by Miranda. We have considerable doubt as to the propriety of even calling a parole officer as a witness for such a purpose. But pretermitting that we have no doubt that the testimony was inadmissable unless the officer gave prior Miranda Warnings. A parolee is under heavy psychological pressure to answer inquiries made by his parole officer, perhaps even greater when the interrogation is by an enforcement officer."

Further the Ohio Supreme Court stated *State v. Gallagher*, 1974, 38 O.S. 2nd 291 and on page 297:

> "We agree that a parolee is under heavy pressure to cooperate with his parole officer. Here, the parole officer, testified that he had the power to recommend the return to prison of a parolee under his charge, and that Appellant might have assumed that his utterances were in some way confidential."

It is clear, therefore, that compulsion intervened when the parole officer sought to elicit a statement from appellant without first making known to appellant that the privilege against self-incrimination could be relied upon.

Capsulized, it would appear that petitioner's argument is that in the interest of justice the safeguards provided

by the Fifth Amendment of the Constitution of the United States should be in some instances set aside in an effort to get the criminals off the street. The argument, in addition to suggesting that the entire Miranda Decision should be reversed, says if the case warrants let us suspend the constitutional provisions temporarily in order to clean up our problem children, then we will invoke it at such time as someone sees fit. Petitioner's argument further suggests that the holding of the Ohio Supreme Court is an extension of the Miranda Doctrine to an area for which it was not intended. Respondent views the holding of the Ohio Supreme Court not as an extension but only as a judicial determination of what was intended by Miranda when it was written. The purpose of the Miranda Decision was to insure, without the necessity of judicial determination in each and every instance, that every person who was incarcerated and was subjected to the police dominated atmosphere would be given certain warnings and would be made aware of the rights provided him by the Fifth Amendment to the Constitution of the United States. The Miranda Decision was the culmination of many instances of improper police behavior in attempting to extract confessions from persons suspected of or charged with the commission of crimes. It is clearly within its purview that a parole officer may be a tool to be used in the extracting of such confessions.

In determining whether or not there is an inherent compulsion when the parolee is confronted by his parole officer, it is inconceivable to believe that the parolee would not feel some pressure by the very nature of the relationship and by the very fact that that person could suggest to the parole board that his parole

be revoked if he does not cooperate. An inherent compulsion becomes even more apparent when, as in the case at hand, a confession has been elicited from the "incarcerated parolee" by improper police activity such as promises to not prosecute for additional crimes.

Petitioner further relies upon the case of *Michigan v. Tucker*, 417 U.S. 433, at page 450. That case, of course is not relevant to this discussion for the reason that the statement sought to be repressed in that action was a statement made by a third person and not by the parolee himself. It is interesting to note, however, that Petitioner would take from that case one statement which may, in fact, be profound but is certainly not conclusive to this issue. While there may be strong reason for balancing the interests of society as opposed to those of the individual, there may be a statement which is well recognized in the law and perhaps even more profound than that set forth in the Petitioner's Brief and the reason for which many of our Constitutional safeguards were created. That being "better that a hundred guilty men go free than that one innocent person be convicted". In conclusion, it is respondent's position that the safeguards set forth in Miranda do in fact, apply to the parolee/parole officer situation and that in the interest of deterring improper activities by such parole officers as by police officers the Miranda Warnings must be given by the parole officer prior to his questioning of a parolee who is incarcerated on a new charge. Petitioner argues that logic and reason lead us to a different conclusion. It should be noted that logic and reason may have been relied upon in decisions prior to the holding in *Miranda v. Arizona*. However, practical experience taught us as set forth in that decision that sometimes logic and reason do not lead us to the rightful conclusion.

For the reasons set forth above the decision of the Ohio Supreme Court should be affirmed.

ARGUMENT

II.

DOES THE READING OF THE MIRANDA WARNINGS AND WAIVER THEREOF BY A PERSON CHARGED WITH OR SUSPECTED OF A CRIME OPERATE AS A WAIVER TO FUTURE STATEMENTS OR CONFESSIONS MADE WHEN SUCH READING AND WAIVER ARE FOLLOWED BY PROMISES FROM POLICE AUTHORITIES THAT WERE GIVEN SOLELY FOR THE PURPOSE OF EXTRACTING CONFESSIONS.

In determining this question the time sequence in this case is extremely important. Respondent was arrested and subsequently on June 22, 1972 read the Miranda Warnings by detectives, signed a rights waiver and was subsequently promised that if he would give a confession to the crime with which he was to be charged that the police authorities would not charge him with additional charges which they could not prove. The trial court properly found that such promises invalidated the Rights Waiver and excluded confessions made by respondent at the trial of this cause.

Petitioner now argues to the Court that the Rights Waiver signed by respondent was sufficient to apprise respondent of his rights and, therefore, that no

subsequent reading was required by the parole officer involved.

It should be noted that both visits by the parole officer to Respondent who was, in fact still incarcerated in the Dayton, Ohio Jail were subsequent to the signing of the Rights Waiver and the promises that were made. It is apparent that at that point respondent's desire to exercise his rights guaranteed by the Fifth Amendment to the United States Constitution had already been resolved by the improper activity of the police detectives involved. The respondent was in the position where the promises had been made, improper confessions elicited and what difference, if any, would one more confession make in viewing the totality of the circumstances in the instant cause; the improper activity began when the promises were made and they, in fact, vitiated any rights waiver that may have been signed by this respondent. Therefore, the balance of Petitioner's argument is of no force and has no validity.

CONCLUSION

In conclusion, it is respectfully urged that this Court give the holding in *Miranda v. Arizona* it's proper efficacy and apply it to the instant cause and affirm the decision of the Ohio Supreme Court.

Respectfully submitted,

JACK T. SCHWARZ
Harrison & Schwarz
730 South Main Street
Dayton, Ohio 45402
Attorney for Respondent

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-492

STATE OF OHIO,

Petitioner,

vs.

TERRY L. GALLAGHER,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Ohio

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

EVELLE J. YOUNGER,
Attorney General of the State of California,
JACK R. WINKLER,
Chief Assistant Attorney General—Criminal Division,
S. CLARK MOORE,
Assistant Attorney General,
FREDERICK R. MILLAR, JR.,
Deputy Attorney General,
THEODORA BERGER,
Deputy Attorney General,
800 Tishman Building,
3580 Wilshire Boulevard,
Los Angeles, Calif. 90010,
(213) 620-5932,
Attorneys for Amicus Curiae State of California.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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IN THE

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Respondent.

On Writ of Certiorari to the Supreme Court of the State of Ohio

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

Interest of Amicus Curiae

The State of California, as the most populous of the fifty states, has had substantial experience under this Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), and in attempting to conform its parole revocation procedures to the requirements of this Court's later decisions in *Morrissey v. Brewer*, 408 U.S. 471 (1972) and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). *Amicus curiae* believes that application of the Fifth Amendment prophylactic rules laid down by the Court in *Miranda* would be inconsistent with the parole agent-parolee relationship and in conflict with the due process approach adopted by this Court in *Morrissey* and *Gagnon, supra.*

In addition, the State of California desires to indicate to this Court its belief that the holding in *People v. Gastelum*, 237 Cal. App. 2d 205, 46 Cal. Rptr. 743 (1965), relied upon by the Supreme Court of Ohio herein, is erroneous in its conclusion that a parole agent is required to give *Miranda* warnings to his parolee before questioning him concerning his arrest on new charges.

Summary of Argument

This Court should not extend its application of Fifth Amendment prophylactic rules laid down in *Miranda v. Arizona*, 384 U.S. 436 (1966) to questioning by a parole officer of his parolee arrested by police on new criminal charges. Such questioning is investigatory in nature and at most an aspect of the parole revocation process governed by the voluntariness standard of the due process clause, in accordance with this Court's recent decisions in *Morrissey v. Brewer*, 408 U.S. 471 (1972) and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). The revocation process is an administrative proceeding and not an adversary criminal trial, hence the flexible standard of the due process clause and not the rigid prophylactic rules of *Miranda* are applicable. The recent decisions of this Court in *Harris v. New York*, 401 U.S. 222 (1971); *Oregon v. Hass*, 43 U.S.L.W. 4417, and *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), have declined to expand the scope of *Miranda*, and have applied instead a due process voluntariness standard.

The function performed by the parole officer is not akin to that of the police interrogator. The parole officer acts more like a social worker than a policeman, and his goal is rehabilitation of the parolee and not the securing of confessions to crime. Questioning by a

parole officer is not inherently coercive and there is no need for the unique prophylactic rules developed in *Miranda* to be applied in this context. The parolee is familiar with his parole officer, with the parole process and with the criminal justice system generally, and the evils of incommunicado police interrogation which this Court dealt with in *Miranda* are not likely to be present. The voluntariness standard of the due process clause of the Fourteenth Amendment provides adequate protection to the parolee, who has a reduced expectation of constitutional protection by virtue of his status as a parolee.

In any event, the interest of society in promptly and accurately determining whether a parolee should remain on conditional liberty in society or should be returned to prison overrides any need for advisement of rights which the parolee might have.

The California case relied upon in part by the Ohio Supreme Court is not persuasive in its reasoning and, in any event, is pre-*Morrissey* and *Gagnon* and does not consider the controlling impact of those cases.

Finally, if the Court should conclude that a *Miranda* warning is required for such questioning, a single advisement should suffice. Since respondent was previously advised by the police and was aware of his rights at the time he talked to his parole officer, his statements should be admissible at trial.

ARGUMENT

I

Questioning by a Parole Agent of His Parolee Arrested by Police on New Criminal Charges Is Investigatory in Nature and at Most an Aspect of the Parole Revocation Process Governed by the Voluntariness Standard of the Due Process Clause Under Morrissey v. Brewer, and Gagnon v. Scarpelli, and Not by the Fifth Amendment Prophylactic Rules of Miranda v. Arizona

A. Application of the Miranda Rules Would Be Inconsistent With the Due Process Standard Used by This Court in Morrissey and Gagnon

All the confession cases decided by this Court in the more than 25 years preceding *Escobedo v. Illinois,* 378 U.S. 478 (1964), were decided under the voluntariness standard of the due process clause of the Fourteenth Amendment. *Miranda v. Arizona, supra,* 384 U.S. 436, 507-08 (1966) (Harlan, J., dissenting). In *Escobedo* the Court for the first time applied the Sixth Amendment right to counsel to invalidate a confession, and in *Miranda* the Court broke new ground again for the second time in two years by turning to the Fifth Amendment privilege against self-incrimination to prohibit incommunicado custodial interrogation by the police without prior warning of rights.

The Fifth Amendment speaks of compelling a person "in any criminal case to be a witness against himself." The words "witness" and "in any criminal case" indicate a privilege applicable at the trial itself or at some analogous proceeding. As Justice Harlan noted in his dissent:

> "Even those who would readily enlarge the privilege must concede some linguistic difficulties since the Fifth Amendment in terms proscribes only compelling any person 'in any criminal case to be a witness against himself.' . . ."
>
> *Miranda v. Arizona, supra,* at 511.

The majority in *Miranda,* however, viewed pretrial custodial interrogation by the police as an extension of the "criminal case," and applied the Fifth Amendment privilege against self-incrimination to this aspect of the "criminal case." *Miranda v. Arizona, supra* at 460-63. *See Michigan v. Payne,* 412 U.S. 47, 53 (1973) (the prophylactic *Miranda* rules were designed to preserve the integrity of "a phase of the criminal process").

Amicus curiae urges that the function performed by a parole agent when his parolee is arrested by the police on new charges cannot be viewed as an extension of the "criminal case" under the Fifth Amendment, as was done in *Miranda,* but rather should be viewed as an extension of the parole revocation process governed by Fourteenth Amendment due process standards and dealt with recently by this Court in *Morrissey v. Brewer,* 408 U.S. 471 (1972) and *Gagnon v. Scarpelli,* 411 U.S. 778 (1973).

In *Morrissey* and *Gagnon, supra,* this Court declined to apply the full panoply of Fifth and Sixth Amendments rights accorded in "criminal proceedings," and instead applied a more flexible Fourteenth Amendment due process standard. As the Court stated in *Morrissey:*

> "We begin with the proposition that the revocation of parole *is not part of a criminal prosecution* and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations. Cf. Mempa v. Rhay, 389 U.S. 128 (1967). *Parole arises after the end of the*

criminal prosecution, including imposition of sentence. Supervision is not directly by the court but by an *administrative agency,* which is sometimes an arm of the court and sometimes of the executive. . . ." 408 U.S. at 480 (emphasis added).

In *Gagnon, supra,* this Court specifically declined to apply a Sixth Amendment right to counsel to the probation revocation process, applying instead a more flexible due process right to counsel standard. This Court equated parole revocation with probation revocation and then reemphasized the basic premise of its holding in *Morrissey:*

". . . Probation revocation, like parole revocation, is not a stage of a criminal prosecution. . . ." *Gagnon v. Scarpelli, supra* at 782.

This Court in *Gagnon* adopted a case-by-case approach under the due process clause by which to judge claimed violations of the right to counsel, stating:

"In so concluding, we are of course aware that the case-by-case approach to the right to counsel in felony prosecutions adopted in Betts v. Brady, 316 U.S. 455 (1942), was later rejected in favor of a *per se* rule in Gideon v. Wainwright, 372 U.S. 335 (1963). See also Argersinger v. Hamlin, 407 U.S. 25 (1972). We do not, however, draw from Gideon and Argersinger the conclusion that a case-by-case approach to furnishing counsel is necessarily inadequate to protect constitutional rights asserted in varying types of proceedings: *there are critical differences between criminal trials and probation or parole revocation hearings, and both society and the probationer or parolee have stakes in preserving these differences." Gagnon v. Scarpelli, supra* at 788-89 (emphasis added).

Just as the pre-*Gideon* case-by-case due process standard was judged adequate to protect the need for counsel at the parole revocation hearing, *amicus curiae* urges that the pre-*Miranda* case-by-case voluntariness appraisal under the due process clause is the proper gauge by which to judge questioning by a parole agent of his parolee arrested on new criminal charges by the police. Indeed, the result in the instant case follows *a fortiori* from this Court's decisions in *Morrissey* and *Gagnon, supra,* since if a due process standard is applicable to the revocation hearing itself—which represents the culmination of the revocation process—it surely follows that a flexible due process standard and not the rigid Fifth Amendment prophylactic rules fashioned in *Miranda* should apply to pre-revocation hearing questioning by a parole agent of his parolee—which is at most a preliminary phase of the revocation process. Just as *Miranda* viewed pretrial police interrogation as an extension of the "criminal case" under the Fifth Amendment, so under *Morrissey* and *Gagnon* pre-revocation hearing questioning by a parole agent constitutes an extension of the revocation process, which is governed by the due process voluntariness standard of the Fourteenth Amendment.

Miranda repeatedly emphasized that the criminal trial is an adversary proceeding, and custodial police interrogation was viewed by the Court as being an extension of the "criminal case" and itself highly adversary in nature, with the goal of the police being to secure a confession of guilt. Thus, the Court spoke of the privilege against self-incrimination as "the essential mainstay of our adversary system" (384 U.S. at 460); referred to "silence in the face of accusation" (384 U.S. at 468); and left no doubt on the issue when

it concluded that the entire purpose of the *Miranda* warnings was "to make the individual acutely aware that he is faced with a phase of the adversary system —that he is not in the presence of persons acting solely in his interest" (384 U.S. at 469).

In contrast, this Court in *Morrissey* and *Gagnon* declined to characterize the revocation process as adversary in nature, and found it to be administrative in nature and hence not requiring "the full panoply of rights due a defendant" in a criminal prosecution under the Fifth and Sixth Amendments. *Morrissey v. Brewer, supra,* 408 U.S. 471, 480. This Court declined to choose between "a full-scale adversary proceeding or no hearing at all," as the Court of Appeals had done. *Morrissey v. Brewer, supra* at 475. Parole officers were characterized not as being part of the criminal prosecution, but rather as being "part of the administrative system designed to assist parolees and to offer them guidance." 408 U.S. at 478. It was noted in *Morrissey* that supervision was "by an administrative agency." 408 U.S. at 480. As if to underscore its reluctance to view the revocation process as being analogous to a criminal prosecution, this Court stated that not even the second stage of the hearings, *i.e.*, the final revocation hearing, was equivalent to a criminal prosecution:

> ". . . We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. . . ." *Id.* at 489.

This Court found the "few basic" due process requirements of *Morrissey* sufficient to insure that "abuses sometimes present in the traditional adversary trial situation do not occur." 408 U.S. at 490.

In *Gagnon v. Scarpelli, supra,* 411 U.S. 778 (1973), this Court reaffirmed what it had held in *Morrissey,* that the revocation of parole "is not a part of the criminal prosecution," and that due process provided the standard of protection for the parolee. 411 U.S. at 781. Again, the Court emphasized, "Probation revocation, like parole revocation, is not a stage of a criminal prosecution." 411 U.S. at 782. In defending its case-by-case approach to counsel problems, this Court in *Gagnon* stated

> ". . . we think it a sufficient answer that we deal here, not with the right of an accused to counsel in a criminal prosecution, but with the more limited due process right of one who is a probationer or parolee only because he has been convicted of a crime." 411 U.S. at 789 (footnote omitted).

It is apparent from the several above-quoted statements from *Morrissey* and *Gagnon, supra,* that the parole revocation process cannot be equated to a criminal prosecution and hence cannot be deemed governed by the requirements of the Fifth and Sixth Amendments. Rather, the revocation process is administrative in nature and is governed by the due process standard of the Fourteenth Amendment. Questioning by a parole agent of his parolee arrested by the police on new criminal charges is preliminary to and hence properly viewed as an adjunct of the revocation process dealt with in *Morrissey* and *Gagnon* and governed by the due process clause. As the long line of pre-*Miranda* confession cases makes clear, due process requires only that the statement from the parolee to the parole agent be "voluntary."

B. Recent Decisions of This Court Have Declined to Extend Miranda and Have Applied Due Process Standards in Analogous Contexts

The balance struck in *Miranda* was an extremely close one, as indicated by the fact that *Miranda* was a 5-4 decision over very strong dissenting opinions. The debate over the soundness of the *Miranda* decision has continued in subsequent cases. *See Mathis v. United States,* 391 U.S. 1, 5-8 (1968) (dissenting opinion joined by White, Harlan, Stewart, JJ.); *Orozco v. Texas,* 394 U.S. 324, 327-31 (1969) (concurring opinion of Harlan, J. and dissenting opinion joined in by White and Stewart, JJ.).

The most recent decisions of this Court have shown little inclination to expand the scope of *Miranda* beyond the situation actually dealt with in that case: incommunicado custodial interrogation by the police designed to secure a confession. Thus, in *Harris v. New York,* 401 U.S. 222 (1971), the Court held that statements obtained by the police from a suspect who had not been advised of his *Miranda* rights were nevertheless admissible on rebuttal to impeach the defendant's contrary testimony at trial. The only limitation imposed by this Court was that such statements be "voluntary" and "trustworthy." *Harris v. New York, supra* at 224. It is this same voluntary-trustworthy standard that *amicus curiae* urges be adopted in the instant case. *Harris* was very recently reaffirmed by this Court in *Oregon v. Hass,* 43 U.S.L.W. 4417 (Mar. 19, 1975), where this Court applied *Harris* to a case where the suspect was advised of his rights, invoked them by asking to talk to an attorney and subsequently made statements used by the prosecution at the trial for impeachment. This Court again emphasized the trustworthiness of the statements

there in issue and the importance of ascertaining the truth at trial, as the Court had done in *Harris.* In the instant case, it appears that the statements in issue were admitted by respondent at trial to have been voluntarily made (Petn. for Certiorari, p. 5, citing Tr. pp. 207, 208). It further appears that the parole officer, Mr. Sykes, testified without dispute that he and respondent "just had an informal talk, that no force was used, and that their conversation certainly was not an interrogation." (Petn. for Certiorari, p. 5, citing Tr. p. 167). Under the voluntary-trustworthy standard used by this Court in *Harris* and *Hass,* the statements made here to a parole officer should be admissible at trial.

In *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973), this Court again recently applied a due process voluntariness standard by which to test the validity of a suspect's consent to search. Rejecting the application of prophylactic *Miranda* warning rules to such a situation, the Court turned to pre-*Miranda* voluntariness cases as the applicable standard, stating:

> "The most extensive judicial exposition of the meaning of 'voluntariness' has been developed in those cases in which the Court has had to determine the 'voluntariness' of a defendant's confession for purposes of the Fourteenth Amendment. Almost 40 years ago, in Brown v. Mississippi, 297 U.S. 278, the Court held that a criminal conviction based upon a confession obtained by brutality and violence was constitutionally invalid under the Due Process Clause of the Fourteenth Amendment. In some 30 different cases decided during the era that intervened between Brown and Escobedo v. Illinois, 378 U.S. 478, the Court was faced with the necessity of determining whether in fact

> the confessions in issue had been 'voluntarily' given. *It is to that body of case law to which we turn* for initial guidance on the meaning of 'voluntariness' in the present context." 412 U.S. at 223-24 (emphasis added; footnotes omitted).

Just as this Court in *Schneckloth* rejected application of *Miranda* in the context of consent to search, and instead turned to pre-*Miranda* cases decided under a due process voluntariness standard, so *amicus curiae* urges here that the Court apply a pre-*Miranda* due process voluntariness standard to the question of admissibility of statements made to a parole officer by a parolee after the parolee has been arrested on new charges.

C. Questioning by a Parole Agent of His Parolee Is Not Inherently Coercive and the Parole Agent Cannot Fairly Be Characterized as a "Law Enforcement Officer" Under Miranda

Miranda reasoned from the premise that custodial interrogation by police is inherently coercive, and hence, absent appropriate warnings to insulate the person being interrogated, any resulting confession must be deemed to be a product of these coercive influences and "compelled" within the meaning of the Fifth Amendment. *See Miranda v. Arizona, supra,* 384 U.S. 436, 457-58, 468. As support for its conclusion, the Court devoted a full 11 pages of its opinion to recounting prior examples of police brutality, torture and improper psychological coercion. Texts and "manuals" were cited, purportedly describing standard interrogation

techniques designed to overcome any reluctance of the suspect to confess. 384 U.S. at 445-56. The majority in *Miranda* then concluded:

> "It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. . . ." 384 U.S. at 457.

The majority in *Miranda* viewed the nature of the problem as extraordinary and its cure was correspondingly drastic.

By way of contrast, this Court does not have before it a history of abuses in questioning by parole agents. *Cf. Schneckloth v. Bustamonte, supra,* 412 U.S. 218, 247 (1973) (absent evidence of coercive practices, there is no reason to believe that a request for consent to search is inherently coercive). Indeed, this is not surprising because studies indicate, as this Court suggested in *Morrissey,* that the parole agent views his function as being more akin to a social worker reponsible for the rehabilitation of his parolees than to a policeman seeking to enforce the law and obtain confessions. Thus, in one fairly recent study, the authors concluded that "The parole officer functions in much the same way as a social worker." Note, *Observations on the Administration of Parole,* 79 Yale L.J. 698, 700 (1970). The parole officer attempts to build trust so that he may be "more effective in his guidance function." *Id.* at 700. The parole officer views himself as a "professional" who tries to help the parolee on the road to rehabilitation. *Id.* at 702-03.

In *Miranda,* the Court proceeded on the assumption that the police officer's goal is to secure a confession,

and that any attempt at explanation is viewed as an admission which can be used as a pry bar to secure an utimate, unqualified confession. *See* 384 U.S. at 451-52, 476-77. This assumption does not apply to a parole officer, who is sympathetic to his parolee and much more likely to accept his explanation, or who at least does not view any explanation as a lever to extort further admissions or contradictions. Whereas the Court in *Miranda* viewed the police officer as achieving success when he obtained a confession and failure when he could not, the parole agent views success as successful completion by the parolee of his term of parole and failure as the return of his parolee to prison.

> ". . . Social work theory provides a definition of successful casework: the establishment of a helping relationship. Instead of adopting this definition, however, officers use a more result-oriented approach, in which they concentrate on the ultimate fate of the parolee. *Success is defined as (1) seeing a parolee through to his discharge from parole, or (2) keeping him out of prison longer than he would have stayed out without the officer's supervision. . . .*" Note, *Observations on the Administration of Parole, supra,* 79 Yale L.J. 698, 708-09 (emphasis added: footnote omitted).

The parole agent does not act in a coercive way; he generally views his role as one of providing guidance to the parolee:

> "The parole officer's claim to professionalism is that he does casework, and his professional norms are those of the social worker, not the policeman. Though there are few standard requirements for becoming a parole officer, many have had social work training, and all feel and exhibit a trained sensitivity to the problems of parolees." *Id.* at 703 (footnote omitted).

Again, the Yale study noted:

> ". . . a striking absence of police ideology among parole officers. For example, revocation was recommended only after a series of events which indicated to the officer that the parolee would not benefit from continued parole. This lack of a punitive orientation is particularly remarkable given the attention paid to the conflict between custodial and treatment goals in the sociology of corrections." *Id.* at 705 (footnote omitted).

Obviously, there is some degree of potential conflict between the custodial and rehabilitative functions that the parole agent also performs, but here again the Yale study concludes:

> "The parole officer's authority to invoke sanctions creates conflicts not only with the parolee but also within himself, by forcing him to choose between the goals of rehabilitation and control. Instead of attempting to reconcile these incompatibles, the parole officer unequivocally pursues the former, choosing to be a social worker rather than an adjunct of the police." Note, *Observations on the Administration of Parole, supra,* 79 Yale L.J. at 704.

Applying the *Miranda* rules to questioning by a parole agent would force the parole agent to become an adjunct of the police, driving a wedge between the parole agent and the parolee which would work to the disadvantage of both. The *Miranda* warning would

tell the parolee that the situation is adversary in nature and the parole agent is the adversary, when in fact this is not the truth. At least two courts have recognized that the purpose of parole would be adversely affected and the relationship between the parole agent and the parolee would be seriously strained if the parole agent were required to obtain an affirmative *Miranda* waiver before talking to the parolee. *People v. Ronald W.*, 24 N.Y. 2d 732, 302 N.Y.S. 2d 260, 262 (1969); *Cunningham v. State*, 488 S.W. 2d 117, 120 (Tex. Cr. App. 1973).

None of the above is intended to suggest that a parole agent is incapable of violating the constitutional rights of a parolee during questioning after the parolee's arrest on new charges. It does indicate, however, that the unique coercive pressures which the Court in *Miranda* found to be present in incommunicado police custodial interrogation are not present in the parole agent-parolee situation and that the voluntariness standard of the due process clause provides adequate protection to the parolee for any abuses that may occur.

Even assuming, *arguendo*, that the instant case is governed by Fifth Amendment and not by due process requirements, the decision in *Miranda* was limited to "questioning initiated by law enforcement officers" (384 U.S. at 444), and each of the four cases dealt with in *Miranda* concerned police questioning. *Amicus curiae* urges for the reasons discussed, *supra*, that a parole agent does not perform the function of a "law enforcement officer" as exemplified by the policeman. His function is more closely akin to that of a social worker or counselor, who sees his goal as aiding the parolee in successfully completing his term of parole or at least

in extending the period of time before he is returned to prison.

As this Court noted in *Morrissey v. Brewer, supra*, 408 U.S. at 478:

> "The parole officers are part of the administrative system designed *to assist parolees and to offer them guidance*. . . . And through the requirement of reporting to the parole officer and seeking guidance and permission before doing many things, *the officer is provided with information about the parolee and an opportunity to advise him. The combination puts the parole officer into the position in which he can try to guide the parolee into constructive development.*" (Emphasis added; footnote omitted.)

That the parole agent's goal is not punitive, or to seek a confession of guilt in every case was recognized by this Court in *Morrissey:*

> ". . . In practice, not every violation of parole conditions automatically leads to revocation. Typically, a parolee will be counseled to abide by the conditions of parole, and the parole officer ordinarily does not take steps to have parole revoked unless he thinks that the violations are serious and continuing so as to indicate that the parolee is not adjusting properly and cannot be counted on to avoid antisocial activity. . . ." 408 U.S. at 479 (footnote omitted).

Moreover, unlike the typical situation under *Miranda* where an individual is questioned in a strange environment by a police officer he probably has never seen before under circumstances foreign to his back-

ground, the parolee knows his parole officer and has developed a working relationship with him through many prior contacts on parole. *Cf. Schneckloth v. Bustamonte, supra,* 412 U.S. 218, 247 (1973) ("Indeed, since consent searches will normally occur on a person's own familiar territory, the specter of incommunicado police interrogation in some remote station house is simply inapposite"). Having been arrested at least once previously on the charge which resulted in his being sent to prison, having been in prison and having knowledge of how the system operates, the parolee is generally in a better position to know his rights and to assert them than the individual subjected to police station questioning under *Miranda.* Parolees are not meek lambs who will confess at the slightest request for information from their parole agents. Although the parole officer strives to build a relationship of trust and communication, the typical parolee nevertheless views his parole agent with considerable mistrust. This mistrust is a natural factor which will further serve to protect the parolee from incriminating himself even without being given *Miranda* warings. *See* Note, *Observations on the Administration of Parole, supra,* 79 Yale L. J. 698, 699, 705-06.[1]

In view of the foregoing, it is not surprising that several states have concluded that a parole officer is

[1]In California, parolees frequently refuse even to sign notification forms developed to comply with *Morrissey* and *Gagnon, supra.* In such cases, the parole agent simply serves the forms on the parolee and notes in his records that the parolee refused to sign them as requested.

not a "law enforcement officer" under *Miranda,* and hence that there is no duty to advise the parolee of his rights. *See People v. Ronald W., supra,* 24 N.Y. 2d 732, 302 N.Y.S. 2d 260, 262 (1969); *Cunningham v. State, supra,* 488 S.W. 2d 117, 120 (Tex. Cr. App. 1973); *State v. Johnson,* 202 N.W. 2d 132, 134 (S. Dak. 1971). As the court stated in *People v. Ronald W., supra* at 262:

> ". . . The clearly stated objectives of education and rehabilitation which are always paramount in the relationship between the probation officer and the probationer . . . are totally foreign to the elements the Supreme Court addressed itself to in Miranda.
>
> ". . . He was questioned not by policemen charged with the duty of apprehending and convicting criminals, but rather by probation officers whose aim is to help probationers rehabilitate themselves.
>
> "It is true that a probation officer is a 'peace officer' . . ., but, certainly, he is not a 'law enforcement' officer within the spirit or meaning of Miranda v. Arizona, supra." (Citations omitted).

The court in *State v. Johnson, supra,* 202 N.W. 2d 132, 134 (S. Dak. 1971) accurately observed:

> "It is the duty of a law enforcement officer to detect crime and enforce the criminal laws of this state. . . . The duty of a probation officer is the antithesis of this. His duty begins when the peace officer's duty ends." (Citation omitted.)

D. The Interest of Society in Determining Whether a Parolee May Safely Remain on Parole Following His Arrest on a New Charge Outweighs Any Need to Advise the Parolee of His Constitutional Rights

In *Miranda*, this Court weighed the interest of society and law enforcement in "a proper system of law enforcement"; stated that it "has always given ample latitude to law enforcement agencies in the legitimate exercise of their duties"; concluded that the decision "should not constitute an undue interference with a proper system of law enforcement"; and noted that the case "does not in any way preclude police from carrying out their traditional investigatory functions." *Miranda v. Arizona, supra,* 384 U.S. at 481.

The interest of society in the immediate determination of the advisability of allowing the parolee to continue on parole, with all available facts being known to the parole officer, is of overriding importance and absolutely critical to the concept of parole. The parole officer charged with the critical responsibility of determining whether an already convicted offender can safely be permitted to remain on parole is in a markedly different position than the police officer interrogating a suspect. The parole officer's function is not accusatorial in nature. Rather it is one of information gathering, a traditional investigatory function of the parole officer. Indeed, although *amicus curiae* urges that a Fifth Amendment standard is completely inapplicable here, and that a Fourteenth Amendment due process standard governs, *Miranda* itself noted that "our decision does not in any way preclude police from carrying out their traditional investigatory functions." *Miranda v. Arizona, supra,* 384 U.S. at 481. In the context of parole, it is not unusual for a parolee to be

arrested on new charges by the police, and a substantial portion of the parole officer's time is expended in the investigatory process of determining the underlying facts, not for the purpose of developing a prosecutable case against the parolee but for the purpose of determining whether the parolee may safely remain on parole. The need to protect society from parolees who have reverted to crime and who pose a danger to society should be deemed paramount over any need a parolee may claim for advisement of rights.

Also to be weighed in the balance is the fact that the parolee does not possess "the absolute liberty to which every citizen is entitled, but only . . . the conditional liberty properly dependent on observance of special parole restrictions." *Morrissey v. Brewer, supra,* 408 U.S. at 480. The parolee accepts parole on several conditions, including that he cooperate with his parole officer. *Morrissey v. Brewer, supra* at 477. The parolee is often required as part of the parole process to submit to examination of his person as part of a narcotic detection program, to keep the parole officer informed of his residence, employment and similar matters, and to regularly report and discuss his progress with the parole officer. *See Morrissey v. Brewer, supra* at 477-78. Several courts have held that *Miranda* has no application in these contexts and that there is no justification for applying it in the context of questioning by a parole officer after a parolee has been arrested by the police on new charges. *Cunningham v. State, supra,* 488 S.W. 2d 117, 120 (Tex. Cr. App. 1973); *Nettles v. State,* 248 So.2d 259, 260 (Fla. App. 1971); *People v. Hamilton,* 260 Cal. App. 2d 103, 105, 66 Cal. Rptr. 831 (1968).

The very essence of the parole officer-parolee relationship is one of communication between the parole officer and the parolee. The need for communication is greatest when the parolee is in trouble, as for example when he is arrested by police on new charges. Application of *Miranda* to such a situation would seriously impede the parole officer in obtaining the information he must have to make proper evaluations of the parolee's progress toward rehabilitation and to protect society in the event the parolee has in fact engaged in dangerous conduct which warrants his return to prison.

This Court in *Morrissey* recognized the need of parole officers to obtain information:

> "Implicit in the system's concern with parole violations is the notion that the parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his parole. The first step in a revocation decision thus involves a *wholly retrospective factual question:* whether the parolee has *in fact* acted in violation of one or more conditions of his parole. . . ." 408 U.S. 479 (emphasis added).

Application of *Miranda* would result in many cases in the inability of the parole officer to obtain the necessary *facts* from the best source of information, the parolee, so that the parole officer can make this initial determination under *Morrissey*.

The second determination which must be made likewise requires *facts:*

> ". . . This part of the decision, too, *depends on facts,* and therefore it is important for the board to know not only that some violation was committed but also to know accurately how many and how serious the violations were. . . ." *Morrissey v. Brewer, supra,* 408 U.S. at 480.

Unlike the police, who have ample sources of investigation at their disposal, the parole officer is generally on his own and naturally turns to the sources most readily available to him: the parolee and the arresting police agency. But if the parole officer is not to be made an adjunct of the police department, and if he is to act fairly, he must be able to discuss the matter with the parolee himself to learn the parolee's side of the matter and to determine whether mitigating circumstances exist. Both the need to protect society adequately and to be fair to the parolee naturally motivate the parole officer to attempt to discuss the matter with his parolee.

We do not assert that the need for information legitimizes any and all actions by a parole officer. *Amicus curiae* does urge, however, that the voluntariness standard of the due process clause of the Fourteenth Amendment provides sufficient protection to the parolee in this context, consistent with his status as a parolee and the legitimate needs of the parole officer and society.

II

The California Cases Which Apply Miranda Are Pre-Morrissey and Not Persuasive

The Supreme Court of Ohio cited as authority for its holding the California decision in *People v. Gastelum*, 237 Cal. App. 2d 205, 46 Cal. Rptr. 743 (1965). That case held that a confession made in response to questioning by defendant's parole officer and city police officers was inadmissible under *Peopie v. Dorado*, 62 Cal. 2d 338, 353-54, 42 Cal. Rptr. 169, 398 P.2d 361. The *Dorado* case was California's response to and interpretation of *Escobedo*.

Amicus curiae urges that *Gastelum, supra,* is not persuasive for two reasons. First, it reasons that since *Dorado* held *Escobedo* applicable to an incarcerated felon being interrogated by prison guards about an offense committed within the prison walls, "Certainly a parolee in constructive custody is no less entitled to these constitutional rights than is a felony in actual custody." *People v. Gastelum, supra* at 209. *Gastelum* failed to distinguish who was doing the questioning and the function being served in *Dorado*. *Dorado* involved prison guards who were questioning to obtain a confession. A parole agent is not in the same category and serves an entirely different function. Second, *Gastelum* is a pre-*Morrissey* and *Gagnon* case which does not therefore consider the language, rationale and necessary implications from those recent decisions of this Court, which *amicus curiae* urges are controlling in the present case.

Amicus curiae would further note that in *People v. Breen,* 238 Cal. App. 2d 164, 168, 47 Cal. Rptr. 644 (1965), the court merely cited without further discussion its prior decision in *Gastelum, supra,* and held *Dorado* applicable to statements made by a California Youth Authority parolee to his parole officer. The *Breen* case presents no additional analysis or support for its conclusion and is not persuasive for the same reasons that *Gastelum, supra,* is not persuasive.

III

If a Miranda Warning Was Required, the Prior Advisement by the Police Sufficed

The second question presented by the petition for certiorari is whether multiple admonitions are required by *Miranda*. (Petn. for Certiorari, p. 3).

Amicus curiae addresses this question only briefly, because we believe that the due process clause of the Fourteenth Amendment provides the applicable standard by which to judge the instant case, rather than the prophylactic warning rules required by *Miranda* under the Fifth Amendment. Assuming, *arguendo,* that the Court holds *Miranda* to be applicable to the instant case, *amicus curiae* would urge the Court to hold that the prior advisement of rights by the police satisfied the requirements of *Miranda* here, and that the meaningless ritual of *seriatim* multiple admonitions and waivers is not necessary. In California, the courts have held that a single admonition and waiver is generally sufficient to cover subsequent questioning, absent a change in

circumstances or long interval of delay. *People v. Johnson*, 70 Cal. 2d 469, 476, 74 Cal. Rptr. 889, 450 P.2d 265 (1969); *People v. Johnson*, 32 Cal. App. 3d 988, 997, 109 Cal. Rptr. 118 (1973); *In re Steven C.*, 9 Cal. App. 3d 255, 267, 88 Cal. Rptr. 97 (1970); *People v. Long*, 6 Cal. App. 3d 741, 748, 86 Cal. Rptr. 227 (1970); *People v. McFadden*, 4 Cal. App. 3d 672, 687, 84 Cal. Rptr. 675 (1970); *People v. Brockman*, 2 Cal. App. 3d 1002, 1006, 83 Cal. Rptr. 70 (1969); *People v. Sievers*, 255 Cal. App. 2d 34, 37-38, 62 Cal. Rptr. 841 (1967).

While in the instant case there was a delay of four days between the initial interrogation by the police and the initial effort of the parole officer to speak to respondent, and eleven days between the initial interrogation by the police and when the parole officer actually spoke to respondent, there is no indication that respondent did not understand his rights when he spoke to his parole officer. Indeed, the strongest evidence that he did understand the prior *Miranda* warning given to him by the police is the fact that when his parole agent attempted to talk to respondent on June 26, 1972, respondent refused to discuss the matter (Petn. for Certiorari, p. 4, citing Tr. pp. 147-49, 151). It is clear that respondent knew his rights on July 3 and that he voluntarily chose to speak to his parole officer at that time without being forced to do so (Petn. for Certiorari, p. 5, citing Tr. pp. 207, 208).

Conclusion

For the foregoing reasons, *amicus curiae* State of California joins petitioner State of Ohio in urging that the judgment of the Supreme Court of Ohio be reversed.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General of the State of California,

JACK R. WINKLER,
Chief Assistant Attorney General—Criminal Division,

S. CLARK MOORE,
Assistant Attorney General,

FREDERICK R. MILLAR, JR.,
Deputy Attorney General,

THEODORA BERGER,
Deputy Attorney General,

By FREDERICK R. MILLAR, JR.,
Deputy Attorney General,

Attorneys for Amicus Curiae State of California.